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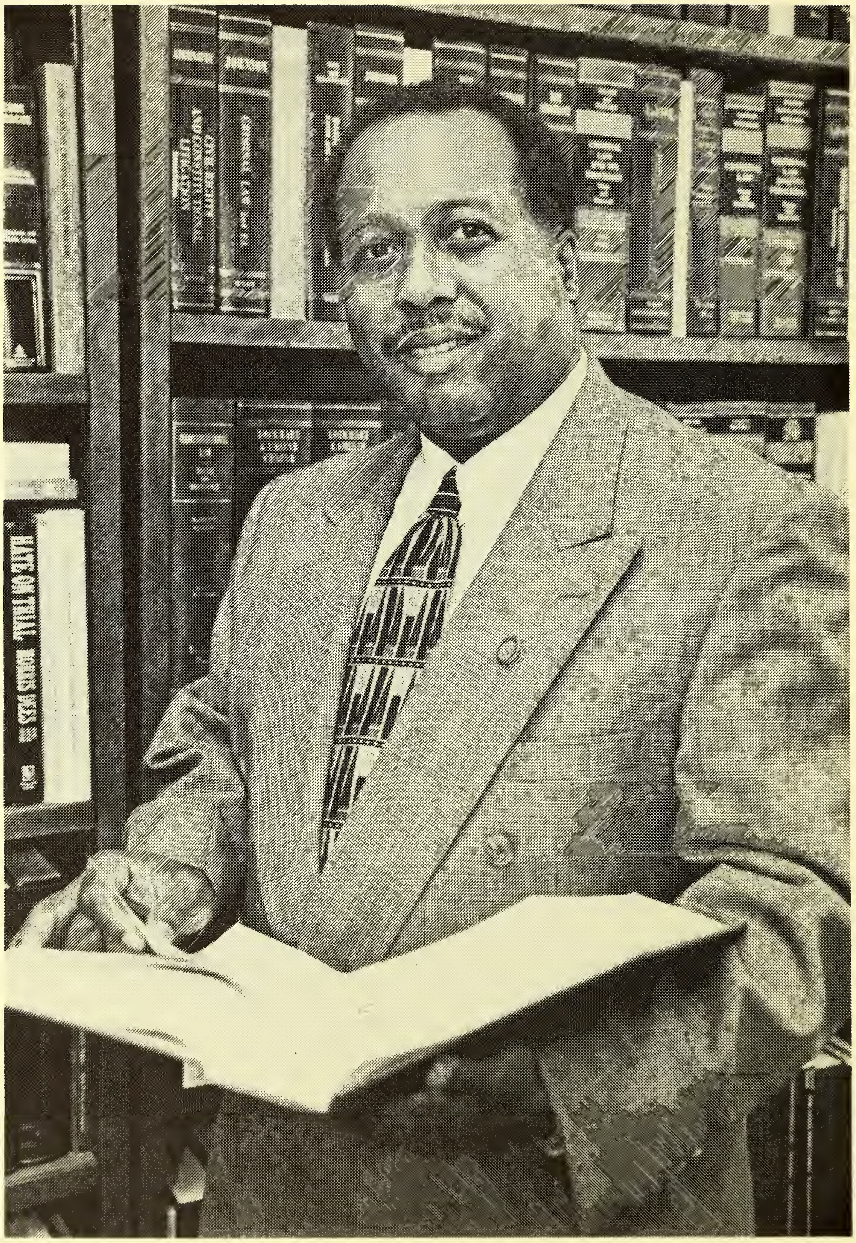
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REMEMBERING DEAN LOUIS WESTERFIELD

John R. Bradley[*]

Louis Westerfield served as dean of the University of Mississippi School of Law from July 1994 until his sudden, unexpected death in New Orleans on August 24, 1996, while attending a joint conference of Louisiana and Mississippi judges with his wife. His regrettably short term as dean was nonetheless highly productive. His appointment as dean was only one of two historically significant appointments of Louis Westerfield at the University of Mississippi.

Louis was the first African-American to become a tenured member of the faculty at this law school, this during his stint on the faculty from 1983-86. He left to become law school dean at North Carolina Central University from 1986-1990 and then law dean at Loyola University in New Orleans from 1990 until his appointment in 1994 made him the first African-American dean in the nearly 150-year history of the University of Mississippi.

The historical significance of this appointment serves only to introduce his accomplishments. A look behind the scenes should be from two vantage points. First, what was there about his abilities and background that led to the son of a Kemper County, Mississippi, sharecropper being chosen as dean of the state law school? Second, what was there about Louis that enabled him to break barriers and to make his mark as a highly effective dean in an all-too-short twenty-six month tenure?

Louis came to be appointed dean of this law school for two reasons. His record of accomplishment in all facets of legal education over a nineteen-year span gave him the ideal experience for the job. In addition, when interviewing for the position, Louis articulated an extraordinary vision of how a small law school in a poor state should continually challenge itself to exceed its expected status by being so geared toward achievement as to provide its students and its state a top rank educational resource.

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[*] Professor of Law, University of Mississippi School of Law.

As part of his vision, he spoke of making a good law school better, assuring that its life was in the mainstream of American legal education and always seeking to be measured by national standards. Louis spoke of attracting capable students from all segments of our society as future lawyers so the public profession of law could serve twin causes of opportunity and justice in a complex and pluralistic world. He talked about a fundamental commitment to give students opportunity and encouragement and then to insist that they meet demanding standards of high achievement.

When Louis was appointed as dean, he knew that the proof of the pudding was in the taste, not in the plans for making it. He brought to the task a wide range of abilities; brimming energy; vision about and insight into the legal profession, legal education and the role of minorities in American life. Many of the indicators of how he performed as dean are intangibles, which while not quantifiable, were clearly observable in their positive impact on students, faculty, alumni and the larger university community. Most dramatic was the national attention attracted for this law school, this university and this state for rising above widespread expectations rooted in an unhappy past of racial insensitivity. Local response, however, was not all applause.

Louis was determined to do everything to ease racial tension from his appointment and absolutely nothing to heighten those feelings. He displayed a model approach by remaining totally above that discussion. It turned out that the protestors demeaned only themselves. By showing himself to be too big a person to be shackled by distrust and recrimination, his was an indelible statement that life in a racially integrated society was actually about accomplishing the real work at hand. By staying far too busy to have a chip on his shoulder, Louis showed black and white alike how to adjust to change. And it was a lesson in total grace, one that anyone who saw it up close will cherish forever. When I am tempted to say that that was Louis' finest hour, I remember other of his attributes that were also so fine as to convince me that on many scores he rose to a level of human achievement not often seen. Some of what he did was truly in a pioneering context, all the more reason to marvel at how sure-footed Louis, still in his forties, was as a leader.

As an African-American dean at a state law school in the South, Louis had a built-in visibility for recruiting minority students. The entering law class in the fall semester of 1995 was the first class recruited after Louis became dean just over a year earlier. When the 1995-96 year ended, three African-American students finished in the top six percent of a class that started with 180 and finished with 170. One led the class. Both events were firsts at this school. This was true even though the school has had many high-achieving minority students over the years. (The law school has actively recruited minority students since a Ford Foundation grant in 1965 provided early funding for what was then a new enterprise for the school.) There was no secret key to this happy occurrence. It was based on opportunity, encouragement, inspiration and expectation. As a recruiter, Louis gave students assurance of being genuinely welcome and of having opportunity for success. Those closest also understood the effect of Louis' passion in challenging both minority and nonminority students not to settle for less than their best effort. This man, short of stature, stood ten feet tall in showing the way to true opportunity--achievement.

One indicator of where Louis set his sights was his campaign to secure for the law school an Order of the Coif chapter. He enlisted alumni and faculty support; knew the was on sound footing in his confidence that the school's quality was deserving of membership; and set out to showcase the school to a tough jury. During his second year alone as dean, funds raised for the law school from private sources (alumni and friends) exceeded $1 million. Louis was infected by a vision that enabled him to convince others that the mission he was pursuing was worth investing in. He held the confidence and support of the faculty, who welcomed and shared his view of the overwhelming importance of making absolutely no compromises on quality. Louis knew that commitment was the foundation for his life's work--at this law school and for his own person wherever his path led him.

By any measure, Louis Westerfield's short tenure as dean stands as a testament of success which promises a profound impact on an institution and on individual lives. His strong and talented wife, sons and daughter remain our friends and in our thoughts. I am honored to write about my friend and colleague.

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THE JAMES MCCLURE MEMORIAL LECTURE IN LAW DELIVERED BY THE HONORABLE CLARENCE THOMAS[*]

October 19, 1995

Thank you for your warm welcome. Members of the Board of Trustees, the McClure family, Chancellor Khayat. I would like to thank Dean Louis Westerfield for being so patient in arranging my visit here. I would like to convey a special word of thanks to the Federalist Society which has been so patient and persistent in extending invitations throughout my tenure on the Court. And, I must admit that I was duly impressed by those students who took the time to travel to Birmingham to hear me speak last year at Cumberland Law School. That enthusiasm is most commendable, and was much appreciated.

I have now completed four years on the Court, and I have begun my fifth Term. For the life of me, I cannot understand how the time has passed so quickly. But even as the time has gone by with a degree of swiftness that is discomforting, my tenure at the Court has been most rewarding. Although the work is obviously difficult, the atmosphere in which we do it is simply delightful. It is a joy to work both individually and collectively with my colleagues.

I would like to return to a topic I touched upon in my previous speeches: personal responsibility. As many of you have heard me say before, the very notion of submitting to one's circumstances was unthinkable in the household in which I was raised. The mere suggestion that difficult circumstance could prevail over individual effort would evoke a response that my brother and I could lip-sync on cue: "Old man can't is dead; I helped bury him." Or, another favorite response: "Where there is a will, there is a way." Under this philosophy—the essential truth of which we all recognize in our hearts—victims have no refuge.

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[*] Associate Justice, United States Supreme Court. Justice Thomas delivered a similar speech to the Eighth Annual Federalist Society Lawyers Convention. A fully-footnoted version of the previous speech has been published at 19 Harv. J.L. & Pub. Pol'y 671 (1996).

It may have seemed harsh at the time to be told that failure was one's own fault. Indeed, there may have been many circumstance beyond our control. But there was much that my family and my community did to reinforce this message of self-determination and self-worth, thereby inoculating us against the victim plague that was highly contagious in the hot, humid climate of segregation. What has become clear to me over the years, as I have witnessed the transformation of our society into one based upon victims rather than heroes, is that there is a more positive message to be gained from adversity: success (as well as failure) is the result of one's own talents, morals, decisions, and actions. Accepting personal responsibility for victory as well as for defeat is as liberating and empowering as it is unpopular today. Overcoming adversity not only gives us our measure as individuals, but it also reinforces those basic principles and rules without which a society based upon freedom and liberty cannot function.

In those years of my youth, there was a deep appreciation of heroes and heroic virtue. Art, literature, and even popular culture (unlike today) often focused on people who demonstrated heroic virtues—courage, persistence, discipline, hard work, humility, triumph in the face of adversity, just to mention a few. These building blocks of self-reliance were replicated and reinforced at home, school, and church. The "rags to riches" Horatio Alger stories were powerful messages of hope and inspiration to those struggling for a better life. And, many of us used to read and dream about heroes—not to mention our favorite television heroes, something perhaps unbelievable these days. I am certain that many of you who attended grammar school in the 1950s or earlier probably remember reading a favorite account of the integrity and work ethic of George Washington, or of Abraham Lincoln, or of George Washington Carver, or even of some baseball or football legend. It seemed that we all had heroes (not role models, a term of far more recent vintage). Indeed, it would have been odd for a child of several decades ago not to have had a hero.

But today, our culture is far less likely to raise up heroes than it is to exalt victims — individuals who are overcome by the sting of oppression, injustice, adversity, neglect, or misfortune. Today, victims of discrimination, racism, poverty, sickness, and societal neglect abound in the popular press. Today there are few (if any) heroes. Often, it seems that those who have succumbed to their circumstances are more likely to be singled out than those who have overcome them.

What caused this cultural shift — from an emphasis on heroes to a preoccupation with victims? Why are there more victims and virtually no heroes recognized today? Why in years past was there much less of an emphasis on victimage?

I think two things contributed to this change in the state of affairs. The first is that our political and legal systems now actively encourage people to claim victim status and to make demands on society for reparations and recompense. The second is that our culture actually seeks to denigrate or deconstruct heroes. Why would a civilized society travel down two such destructive paths? Why has it become no more admirable to rise valiantly above one's circumstances than it is to submit to them—all the while aggressively transferring responsibility for one's condition to others?

Lets begin with our political and legal systems—how have they contributed to this state of affairs? The classical conception was that government and the law were meant to ensure freedom and equality of opportunity by giving people the most room possible for self-provision and self-determination. James Madison made this point in *The Federalist Papers* when he observed that the "protection" of the "diversity of faculties in men" was the "first object" of government. And, in more recent times, the great political economist Friedrich von Hayek — who witnessed totalitarianism first hand—made a similar point when he observed that "the chief aim of freedom is to provide both the opportunity and the inducement to insure the maximum use of the knowledge that an individual can acquire."

Between the New Deal and the 1960s, a far different view began to hold sway—namely, that the role of the state was to eliminate want, suffering and adversity. Freedom was no longer simply a right to self-provision and self-determination, but was instead a right to make demands on government and society for one's well-being and happiness. That is the import of Franklin Roosevelt's "Citizen Bill of Rights," which spoke of freedom from want—rights to minimum income, housing, and other "adequate protections from economic fears." And, I think it is axiomatic that the call for such new rights (if not claims) became ever more prevalent in the 1950s and 1960s.

No doubt, this gradual transformation in ideas took root and flourished (at least in part) because of the aggregate growth in wealth and resources we were witnessing in this country during the course of the 20th century. Against the background of this prosperity, poverty stood out in bold relief and in uncomfortably stark contrast—even as the number of people suffering from it shrank. It is not surprising that people began to think that, in a world of seemingly unlimited resources, adversity could be eliminated, or, at the very least, remedied. The ideal of the "benevolent state" took hold. In our "enlightened" society, neglect, misfortune, and injustice did not have to be accepted as inevitable facts of life. Good government and laws could step in when necessary, as many believed they had successfully done during two World Wars, the Great Depression, and the Civil Rights Movement.

If one assumes that suffering and adversity can be eliminated, but sees a number of people continuing to suffer from adversity or misfortune, then there must be some forces in society that relegate the "have nots" to this fate. Or, at the very least, the less fortunate are being ignored. Those facing adversity, hence, are victims of a society that is not doing as much as it could (if it so desired), and these victims can (and should) stake a legitimate claim against the political and legal systems for recompense. On this view, neglect or selfishness on the part of society and government is responsible for the sting of oppression, injustice, and misfortune that the unfortunate and "have nots" feel today.

In light of this modern ideology, is it any surprise that people identify themselves as victims and make demands on the political systems for special status and entitlements? Our culture expects (and, indeed, encourages) people to do exactly that. Consider, for example, the creation and continued expansion of the welfare state and other social programs in this country. How often have we heard proponents of these programs lull the poor into thinking that they are hopeless victims, incapable of triumphing over adversity without "benevolent intervention" by the state? How often have we heard about these proponents encouraging the less fortunate in our society to become indignant about their situation in life and more demanding on the political system to find solutions to their problems?

It is not only in the political system, though, that we see our society and its leaders succumbing to the modern ideology of victimhood. As with the political system, people today also are strongly encouraged to make demands on the legal system by claiming victim status. Indeed, the legal system has, in many ways, become a significant driving force behind the modern ideology of victimhood. Courts are viewed as an effective means of forcing (or at least pressuring) political institutions into meeting demands for protected status and new rights or entitlements. Pointing to perceived "victimization" by "the system" or by others in society, our legal culture has often told the least fortunate in our society that their last hope is to claim special, legal rights and benefits, or to seek exoneration for the harmful, criminal consequences of their acts. The least fortunate are encouraged to turn to legal arguments that admit defeat and that challenge the moral authority of society. In these ways, courts are called upon to solve social problems—by creating special rules, and by crafting remedies that will satisfy the claims and demands of victim groups but that do not apply to all of us.

Appealing to the legal system, though, was not as easy a task as making demands on the political system. Our legal system has traditionally required that redress for grievances only be granted after very exacting standards have been met. There had to be, for example, very distinct, individualized harm. And, the definition of harm was circumscribed by a traditional understanding of adjudication under the common law, where narrow disputes regarding traditional property rights were resolved among private parties who could not settle matters on their own. Very generalized claims of misfortune or oppression or neglect—the kinds of assertions made in the political system—would not easily fit into this common mold of court activity. It would not be enough for people to be indignant, angry, and demanding about their situation in life. There would have to be an assertion of a legal wrong and a persuasive argument that a legal remedy was available.

The pressure of victimology "revolutionized"—and that word does not always have positive connotations—the court and the law. For those in our culture seeking to use the courts as agents of social change, poverty, unemployment, social deviancy, and criminal behavior were not just unfair conditions in our society that could be eliminated if only people or politicians cared. Instead, these abstract problems were personified as the direct actions of local schools, churches, businesses, and other social institutions so that they could be sued for causing individualized harm to the victims. Based on this new kind of harm—a kind of legalistic understanding of "victimage"—the courts were said to be obligated to recognize special rights and protected status under the law.

Take, for example, welfare rights and due process. Beginning with *Goldberg v. Kelly*, our cases underscored the importance of welfare as a means of preventing social malaise, promoting the general welfare, and securing the blessings of liberty for all Americans. The rights to life, liberty, and property were, in effect, transformed from freedom from government interference into a right to welfare payments. There are countless other examples in legal literature and judicial opinions—some have argued that inner city minorities and the poor should not be held responsible for the consequences of their criminal acts because of oppression and misfortune; and, of course, there is the debate now raging about preferences based on sex, race, and ethnicity.

This change in our political and legal systems has been accompanied by the rise of the "victim group." These groups are quite useful to public officials for building coalitions for future political support and legitimacy as well. And, for the courts, "victim groups" provide useful justification or cover for energizing the legislative process, changing the legislative agenda, forcing reconsideration of spending priorities, and transforming public debate.

But the rise of victimhood, and its perpetuation by government and the law, is only part of the modern tragedy. There is also the dearth of heroes in our culture. Significantly, as the number of these "victim groups" has escalated, there has been a corresponding decline in the amount of attention that our culture has paid to heroes or, even worse, a conscious attempt to cheapen their achievements. Today, success or a commitment to fighting for noble ideas is attributed to self-interest, revenge, self-aggrandizement, insecurity, or some psychological idiosyncrasy. Just thumb through recently published biographies in the library or bookstore—in many of them, it is not a conscious effort to be virtuous or to do good, but instead a series of unforeseeable and external forces, that lead to greatness or success. And, in many of these biographies, we are introduced to the uncut, "never before seen" foibles, mistakes, and transgressions of people our culture idealized for centuries. The message—that these so-called heroes are really just regular people capable of folly and vice who happened to have a few good breaks. In *Democracy in America*, Alexis de Tocqueville anticipated this state of affairs when he said: "historians who live in democratic times do not only refuse to admit that some citizens may influence the destiny of a people, but also take away from the people themselves the faculty of modifying their own lot and make them depend on an inflexible providence or a kind of blind fatality."

Now, the problem these days is not that there are no people who should be singled out as heroes. Rather, as Daniel Boorstin suggests in his book, *The Image*, society is preoccupied with celebrities. And heroism and celebrity status are two very different things. The word hero refers to people of great strength, integrity, or courage who are recognized and admired for their accomplishments and achievements. The word celebrity, on the other hand, refers to a condition — the condition of being much talked about. It is a state of notoriety or famousness. As Boorstin says, "a celebrity is a person who is known for his well-knownness." Thus, while a hero is distinguished by his achievement, celebrities are created by the media and are simply a trademark. Celebrities are, in short, neither good nor bad—they are just a big name. Publicity is the defining feature of a celebrity's existence, and, unlike a hero who will become greater as time passes, time destroys celebrities. Over time the glare of publicity, as Boorstin notes, melts away the celebrity by shedding light and heat on his vices and commonplaceness.

This pattern of ignoring and deconstructing heroes — and focusing instead on the ephemeral celebrity who is known for his well-knownness rather than character or individual worth—stems from the rise of radical egalitarianism. In the 1960s, many of the cultural elite saw a need to ensure absolute equality. On this view, differences in ability and level of achievement are random or uncontrolled, and to permit these characteristics to dictate human happiness and well-being would therefore be unfair. Celebrity status, in contrast, is not a problem for egalitarians, for as Boorstin notes, "anyone can become a celebrity, if only he can get into the news and stay there." Certainly, real achievement is not necessarily required.

It should surprise no one that our culture now has far less difficulty recognizing celebrities than it does those who achieve success as a result of personal effort and character traits that we traditionally would consider heroic. Denigrating heroic virtue — in other words, chalking heroism up to circumstance — fits quite well with the notion that we must all be the same and that there can be no significant differences in our achievement, social standing, or wealth.

Anyone can see what these intellectual currents have done to the ideals of human dignity, personal responsibility, and self-determination. Preoccupation with victim status has caused people to focus covetously on what they do not have in comparison to others, or on what has happened to them in the past. Many fail to see the freedom they do have and the talents and resources that are at their disposal.

Our culture today discourages, and even at times stifles, heroic virtues — fortitude, character, courage, a sense of self-worth. For so many, the will, the spirit, and a firm sense of self-respect and self-worth have been suffocated. Many in today's society do not expect the less fortunate to accept responsibility for (and overcome) their present circumstances. Because they are given no chance to overcome their circumstances, they will not have the chance to savor the triumph over adversity. They are instead given the right to fret and complain, and are encouraged to avoid responsibility and self-help. This is a poor substitute for the empowering rewards of true victory over adversity. One of my favorite memories of my grandfather is how he would walk slowly by the corn field, admiring the fruits of his labor. I have often thought that just the sight of a tall stand of corn must have been more nourishing to his spirit than the corn itself was to his body.

But the culture of victimology—with its emphasis on the so-called "benevolent state"—delivers an additional (and perhaps worse) blow to dignity and self-worth. When the less fortunate do accomplish something, they are often denied the sense of achievement which is so very important for strengthening and empowering the human spirit. They owe all their achievements to the "anointed" in society who supposedly changed the circumstances—not to their own efforts. Long hours, hard work, discipline, and sacrifice are all irrelevant. In a world where the less fortunate are given special treatment and benefits—and, significantly, where they are told that whatever gains or successes they have realized would not be possible without protected status and special benefits — the so-called beneficiaries of state-sponsored benevolence are denied the opportunity to derive any sense of satisfaction from their hard work and self-help. There is not a one among us who views what others do for us the same way we view what we do for ourselves. No matter how much we appreciate the help, it is still just that—help, not achievement.

It also bears noting that our culture's preoccupation with grouping victims has balkanized society. The "We/They" mentality of calling oneself a victim of society breeds social conflict and calls into question the moral authority of society. The idea that whole groups or classes are victims robs individuals of an independent spirit—they are just moving along with the "herd" of other victims. Such individuals also lack any incentive to be independent, because they know that as part of an oppressed group they will neither be singled out for the life choices they make nor capable of distinguishing themselves by their own efforts.

As victim ideology flourishes, and people are demoralized by its grip, more and more people begin to think that they must claim victim status to get anywhere in this world. Indeed, is it any surprise that anyone and everyone can claim to be a victim of something these days. In his book *The Abuse Excuse*, Alan Dershowitz criticizes countless examples of conditions that "victimize" people and thereby release them from responsibility for their actions. Here are just a few examples:

> * the "black rage defense," which asserts that blacks who are constantly subjected to oppression and racial injustice will become uncontrollably violent;
>
> * "urban survival syndrome," which claims that violent living conditions justify acts of aggression in the community;
>
> * "self-victimization syndrome," which maintains that people become less productive and creative, and become severely depressed, as a result of societal neglect and discrimination.

Most significantly, there is the backlash against affirmative action by "angry white males." I do not question a person's belief that affirmative action is unjust because it judges people based on their sex or the color of their skin. But something far more insidious is afoot. For some white men, preoccupation with oppression has become the defining feature of their existence. They have fallen prey to the very aspects of the modern ideology of victimology that they deplore.

Some critics of affirmative action, for example, fault today's civil rights movement for demanding equality yet supporting policies that discriminate based on race. These critics expect the intended beneficiaries of the civil rights regime to break away from the ideology of victimhood: to cherish freedom, to accept responsibility, and, where necessary, to demonstrate fortitude in the face of unfairness. I do not quarrel with this. But these critics should hold themselves to the same standards, resisting the temptation to allow resentment over what they consider reverse discrimination to take hold of their lives and to get the best of them. They must remember that if we are to play the victim game the very people they decry have the better claim to victim status.

Of course, de-emphasizing heroism exacerbates all these problems. Human beings have always faced the temptation to permit adversity or hate to dominate and destroy their lives. To counter this tendency, society had heroes — people capable of overcoming the very adversity or injustice that currently affects today's victims. They rose above their circumstances and inherent imperfections. Heroes cherished freedom, and tried to accomplish much with what little they had. Heroes demonstrated perseverance in the face of adversity and used hardship as a means to strive for greater virtue. And heroes accepted responsibility — they did what they did despite fear and temptation, and tried to do the right thing when presented with a choice between good and evil. It is awfully hard for society to inculcate these values without some useful models from the past and present.

I may not have realized it as a child, but my grandfather was a hero who had a tremendous impact on my life. He certainly would not be a celebrity by today's standards. Though barely able to read and saddled with the burdens of segregation, he worked hard to provide for his family. He was a deeply religious man who lived by the Christian virtues. He was a man who believed in responsibility and self-help. And though this could not bring him freedom in a segregated society, it at least gave him independence from its daily demeaning clutches.

In all the years I spent in my grandparent's house, I never heard them complain that they were victims. Now, they did not like segregation or think that it was right. In fact, there was no question that it was immoral and that anyone who promoted it was morally reprehensible. But there was work to be done. I assure you that I did not enjoy the demands he placed on us. I saw no value in rising with the chicken, and unlike him, I was not obsessed with what I will call the "reverse dracula syndrome": that is, fear that the rising sun would catch me in bed. It would not be until I was exposed to the most fortunate and best educated in our society that I would be informed that all this time I had been a victim. I am sure you can imagine what it was like when I returned home to Savannah, and informed my grandparents that with the education I had received because of their tremendous foresight and sacrifice, I had discovered our oppressed and victimized status in society. Needless to say relations were quite strained, and our vacation visits were somewhat difficult. My grandfather was no victim and he didn't send me to school to become one.

There are many people like my grandfather alive today. The cultural elite does not honor them as the heroes they are, but instead views them as people who are sadly ignorant of their victim status or who have forgotten where they came from. Our social institutions do not train today's young to view such people as heroes and do not urge them to emulate their virtues.

In idealizing heroic virtue and criticizing the victim ideology of our day, I am not saying that society is free from intractable and very saddening injustice and harm. That would not be true. But, the idea that government can be the primary instrument for the elimination of misfortune is a fundamental misunderstanding of the human condition. There has always been bad and suffering in the world, and we must admit that wrongs have been and will continue to be committed. People will always be treated unfairly—we can never eliminate oppression or adversity completely, though we can and should fight injustice as best we can.

But keep in mind that all of us are easily tempted to think of ourselves as victims and thereby permit adversity to be the defining feature of our lives. In so doing, we deny the very attributes that are at the core of human dignity—freedom of will, the capacity to choose between good and bad, and the ability to endure adversity and to use it for gain. Victimhood destroys the human spirit.

I also am not saying that we should expect everyone to be a hero all of the time. We humans are weak by our very nature; all of us at times will permit hardship to get the very best of us. But having a set of norms to guide us and to push us along—the stuff of heroes—can be a source of great strength. If we do not have a society that honors people who make the right choices in the face of adversity — and reject the bad choices—far fewer people will make the right choices. Ultimately, without a celebration of heroic virtue, we throw ourselves into the current state of affairs, where man is a passive victim incapable of triumphing over adversity and where aggression, resentment, envy and other vice thwart progress and true happiness. Many of us who are criticized for a so-called conservative message know that we can overcome this criticism by spicing our message with nationalism, aggression, resentment, or even hate.

What I am saying is that it requires the leadership of heroes and the best efforts of all to advance civilization and to ensure that its people follow the path of virtue. And, because of the role law has played in perpetuating victim ideology, and because of the influence law can have in teaching people about right and wrong, lawyers have a special obligation here. We should seek to pare back the victimology that pervades our law, and thereby encourage a new generation of heroes to flourish.

I am reminded of what Saint Thomas a´ Kempis wrote more than 500 years ago about the human spirit. His standard is a useful one for thinking about the instruction that our law should be offering: “take care to ensure that in every place, action, and outward occupation you remain inwardly free and your own master. Control circumstances, and do not allow them to control you. Only so can you be a master and ruler of your actions, not their servant or slave; a free man . . . .”

THE LAW OF CORPORATE GOVERNANCE: COMING OF AGE IN MISSISSIPPI?

James L. Robertson[*]

I. INTRODUCTION

Of late there has been ferment in the field of corporate governance. The American Law Institute has emerged from the controversy surrounding its decade plus efforts and published its massive (re)statement of principles.[1] The Congress has overridden a presidential veto to strike at strike suits via the Private Securities Litigation Reform Act of 1995,[2] and California has soundly rejected a popular initiative designed to undermine that Act,[3] all reflecting a broader public mood that corporate directors and officers get sued more often than they should. In response to another federal enactment,[4] Mississippi has redefined—under the guise of clarifying—the duties of bank directors and officers and has done so through less than helpful legislative language, however effective it may be in practice.[5]

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[1] PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994) [hereinafter PRINCIPLES]. The American Law Institutes's compilation reflects common understanding of key legal relationships in corporations: particularly those of shareholders, directors, and management. Geoffrey C. Hazard, Jr., *Director's Foreword* to PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS IX, IX (1994).

[2] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 [hereinafter Private Securities Litigation Act]. The Act is technically beyond the scope of what follows. It is noted because it provides a substantive safe harbor for corporate management regarding forward looking disclosures to the investing public and removes incentives to plaintiff participation in meritless class action private securities litigation. § 102, 109 Stat. at 749-56. Like most of what follows, the Act bespeaks an attitude in our law that corporate management should spend more time doing what we want it to do—in this instance making disclosures regarding looking plans for the company—and less time making sure their rear and flanks are protected against strike suits. § 102, 109 Stat. at 750-52.

[3] On November 5, 1996, the voters of California had before them Proposition 211. On the premise that the Private Securities Litigation Reform Act of 1995

There is more law in the field of corporate governance than before, and it has merged against the backdrop of a more public presentation.[6] Legislatively, Mississippi annually amends and augments its version of the Revised Model Business Corporation Act.[7] Judicially, this state has embraced the ALI's black letter expression of the business judgment rule.[8]

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contained no provision preempting state law in the field, Proposition 211 sought to create, in California law, all that had been taken away by the Congress, and much more. Thom W. Weisel, *Recipe for Corporate Disaster*, N.Y. TIMES, Nov. 3, 1996, at F11. Under Proposition 211, any corporation, wherever its domicile or its principal place of business, and its directors and officers, would have been subject to suit in California at the hands of any California resident who happened to own shares of stock in the corporation. In the end, Proposition 211 was rejected by a vote of 72 percent to 28 percent.

[4] Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989, Pub. L. No. 101-73, § 212(a), 103 Stat. 183, 242 (codified at 12 U.S.C. § 1821(k) (1994)). Section 212(k) of the Financial Institutions Reform, Recovery, and Enforcement Act provides for civil liability of directors or officers of insured depository institutions only in cases of gross negligence or intentional misconduct. § 212(k), 103 Stat. at 243.

[5] MISS. CODE ANN. § 81-5-105 (1996).

[6] Seminar on Shareholder Disputes presented by Lorman Education Services, Henry E. Chatham, Jr., Chairman, in Jackson, Miss. (June 25, 1993); Seminar on Advising the Corporate Client presented by Lorman Business Center, Inc., Henry E. Chatham, Jr., Chairman, Jackson, Miss. (May 12, 1994); Seminar on Shareholder Disputes presented by Lorman Education Services, Henry E. Chatham, Jr., Chairman, Jackson, Miss. (Sept. 8, 1995).

[7] With occasional deviations from the Official Text, the Mississippi Legislature in 1987 enacted the Revised Model Business Corporation Act as developed and promulgated by the American Bar Association's Committee on Corporate Laws. Mississippi has since amended the Act at least six times. *See* 1987 Miss. Laws 486; 1988 Miss. Laws 368, 369; 1990 Miss. Laws 538; 1991 Miss. Laws 320; 1993 Miss. Laws 368; 1994 Miss. Laws 417; 1995 Miss. Laws 362; 1996 Miss. Laws 459, all codified at MISS. CODE ANN. §§ 79-4-1.01-16.22 (1996) under the title "Mississippi Business Corporation Act." It is hereafter referred to as RMBCAAEIMAA, acronym for Revised Model Business Corporation Act As Enacted In Mississippi And Amended.

[8] Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 85 (Miss. 1992).

More and more, our case law confronts intra-corporate controversies and fills the interstices in our law.[9]

More globally, the generality and form in which standards of conduct for directors[10] and officers[11] have heretofore been presented are increasingly seen as less than optimal, if not downright problematic. The debate rages whether the Revised Model Act should be amended to provide more specific and detailed expressions of liability standards, with the present statutory standards relegated to an aspirational role, or whether the draftsmen of the RMA will come forth with a statutory statement of the business judgment rule now that the ALI's black letter is before us. All of this occurs in the midst of a reenactment of the ancient and increasingly quaint debate regarding the relative merits of statutory versus common law forms of expressing substantive rules of the positive law. The jury is still out on these important points; that is, the American Bar Association's Committee on Corporate Laws,[12] the progenitor and guardian of the Revised Model

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The court stated that a corporate officer's duty of care is subject to the defense provided by the business judgment rule outlined in PRINCIPLES, *supra* note 1, § 4.01(c). *Omnibank of Mantee*, 607 So. 2d at 85. The rule provides that:

> A director or officer who makes a business judgment in good faith fulfills the duty . . . [of care] if the director of officer:
> (1) is not interested . . . in the subject of the business judgment;
> (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
> (3) rationally believes that the business judgment is in the best interests of the corporation.

Id. (quoting PRINCIPLES, *supra* note 1, § 4.01(c)).

[9] *See* Aqua-Culture Techs., Ltd. v. Holly, 677 So. 2d 171 (Miss. 1996); Turner v. Wilson, 620 So. 2d 545 (Miss. 1993); Omnibank of Mantee v. United S. Bank, 607 So. 2d 76 (Miss. 1992); Derouen v. Murray, 604 So. 2d 1086 (Miss. 1992). Jason--Amy came by and said she remembered redoing this footnote, but has no idea where it is now. If you need help with it, call her.

[10] MISS. CODE ANN. § 79-4-8.30 (1996) (enacting section 8.30 of the Revised Model Business Corporation Act).

[11] *Id.* § 79-4-8.42 (enacting section 8.42 of the Revised Model Business Corporation Act).

[12] *See* the recent work of the ABA Committee's Chapter 8 Task Force. Technically, the Committee itself is a creature of the ABA's Section of Business, Bank-

Business Corporation Act, remains hard at work but has yet to speak to these pressing issues.

Here we will address the legal duties of the directors and officers of corporations, not in the abstract or in a vacuum but in practical life and in a context. Duties have long been thought to import correlative rights,[13] but, for those to be of more than passing academic interest, we must see their setting and effect in the real world. That setting is the private, for-profit corporation, competing in a quasi-free market economy, but subject to the rule of law in its internal affairs. Duties are so devolved upon directors and officers, and we see their effect when something goes wrong. When this happens, disagreements are followed by disputes that often reach the level of importance and intensity that litigation is seriously contemplated, if not commenced. Intracorporate disagreements and disputes have an equal if not greater effect that is not so readily seen. We refer to the decision delayed or not made at all and the deterrent effect of a litigious climate that often inhibits enterprise or fraud, depending upon one's point of view.

Such disputes seldom arise between passive shareholders *qua* shareholders. They arise because someone is unhappy about the way the company is being run, and seriously so, and they often center on the conduct of those who do the running, the directors and the officers. Substantively, such disputes turn on the duties the law devolves upon directors and officers the performance it demands of them, and the defenses it affords them. Practicably, the formulae of these duties and defenses function not so much as guides to conduct, but as standards of judicial review of corporate decision-making.[14]

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ing and Corporate Laws.

[13] Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 167 (1919). Corbin defines rights and duties as correlative of one another with subsequent legal consequences for breach. *Id.*; *see* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 141-55 (temp. ed. 1958) (delineating various duties and their correlative rights).

[14] DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 3-4 (4th ed. 1993).

Common talk of the duties directors and officers owe their corporation and its shareholders[15] leaves much to be desired. Ever recurring references to directors' and officers' "fiduciary duties"[16] imply a less than helpful or accurate commonality of diverse duties and conjures images of trustees, if not guardians and conservators. To show that we are learned, we are quick to quote Cardozo's reminder that fiduciaries are "held to something stricter than the morals of the market place."[17] It sounds so good we seldom stop to see whether it fits and what it means.

It is time we took stock. The recent ferment in Mississippi and beyond needs context for full understanding. The actionable duties of directors and officers have a history in our law. They exist today as expressions of articulable and conflicting policy premises. A century of experience, albeit sporadic and at times halting, has sharpened our insights, so that complexities and nuances once unseen are increasingly within our grasp. We are challenged to revisit one of the theoretical underpinnings of our law of corporate governance—that the relationship between directors and senior executives, and the corporations and shareholders they serve should be described as fiduciary in nature. This notion, if it is to be retained, must be reconsidered and reconciled with the realities of the roles of those who run our corporations. Thoughtful expositions and reflections on these matters appear in the pages of this journal, but they all predate the recent developments.[18] The one article that addresses the Revised Model Business Corporation Act is a decade old and even it predates Mississippi's enactment of the Act.[19] It is time to visit the field anew and to probe its features in full, in order that the eruptions of late may be best understood.

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[15] PRINCIPLES, *supra* note 1, § 4.01 cmt. f. *Principles* makes clear the officer or director's duty of care runs only to the corporation and its shareholders, and not to third parties such as "tort claimants or government agencies." *Id.* Mississippi case law suggests these duties run to a pledgee of corporate shares, Gibson v. Manuel, 534 So. 2d 199, 202-03 (Miss. 1988) (stating pledgee has same interest as shareholder in management of corporate affairs and therefore officers have fiduciary duty to protect pledgee's interest), and, in extreme cases, even to creditors. Cooper v. Mississippi Land Co., 220 So. 2d 302, 307 (Miss. 1969) (announcing corporate directors may not take actions giving preference to director/creditors over general creditors); Ellis v. H.P. Gates Mercantile Co., 60 So. 649 (Miss. 1913) (suit by depositors against directors of failed bank and others); *see also* Saunders v. Berrong, 183 So. 2d 637, 642 (Miss. 1966) (Ethridge, C.J., dissenting) (arguing contract calling for one director to refrain from bidding at tax sale was against public policy and void). Recently, *Turner v. Wilson* has made clear that a corporate officer or director is not liable to a creditor or other third person absent a showing that direct personal involvement of the officer or director in some decision or action causally related to the plaintiff's injury. Turner v. Wilson, 620 So. 2d 545, 548-49 (Miss. 1993). Yet, it is scary to see how (erroneously) far two members of the court would take the point toward liability. *Id.* at 554 (McRae, J., concurring in part and dissenting in part) (arguing director may be held liable for wrongdoing of employees when director failed to act).

[16] Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979). A number of cases deal with the nature of the corporate officer's fiduciary duty. *Ellzey*, 376 So. 2d at 1332; *see, e.g.,* American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240 (Miss. 1975) (stating that property acquisition by directors was breach of fiduciary duty to corporation).

[17] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (emphasizing scope of fiduciary duty to copartners), *quoted in* Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 90 (Miss. 1992). Judge Cardozo opined that the fiduciary owed to another the highest level of loyalty and honesty in business dealings. *Meinhard*, 164 N.E. at 546.

What we need—and what our loose language lacks—is hard thought about the reasons for and the ends served by the duties directors and officers owe. We need as well thought of the law's limited capacity to shape beneficial intracorporate behavior or to do so efficiently. We need disciplined and dispassionate attention to the form, content, and articulation of directors' and officers' duties, of those to whom these duties extend and who may per force upon default bring suit, and of how in an imperfect world we may approach that most elusive of legal imperatives—an approximate congruence between declared rule and official action.[20] But before any of this hard thinking may be done with any promise of profit, we need note fundamentally a handful of metalegal policy points, and we need approach these not as black letter lawyers but as "masters of economics."[21]

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[18] E. Clifton Hodge, Jr. & Alan W. Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?*, 46 MISS. L.J. 371 (1975) (discussing pros and cons of 1962 Mississippi Business Corporation Act compared to then current version of Model Business Corporation Act). There has been no reconsideration of the nature of the duties of corporate officers since Mississippi's enactment of the Model Business Corporation Act. *Id.* at 373; *see also* Janice E. Holley, Comment, *Transactions Between a Corporation and Its Directors: Where Does Mississippi Stand?*, 52 MISS. L.J. 877, 878-95 (1982) (tracing development of statutory and common law as regards transactions between corporate directors and corporations prior to enactment of Revised Model Business Corporation Act).

[19] Wendell H. Holmes, *The Revised Model Business Corporation Act and Corporate Law Reform in Mississippi* (pts. 1 & 2), 56 MISS. L.J. 165 (1986), 57 MISS. L.J. 271 (1987). Part one discusses the relationship of the Mississippi Business Corporation Act of 1962 to the provisions of the Revised Model Business Corporation Act of 1984. *Id.* at 165-71. Part two undertakes an analysis of the 1987 Mississippi Business Corporation Act and the Revised Model Business Corporation Act of 1984. *Id.* at 271-72.

II. ENTERPRISE VS. ACCOUNTABILITY:

The Oft Conflicting Policy Dimensions

Enterprise and accountability broadly label our principal policy concerns in the law of corporate governance today.[22] These are concerns greatly at tension one with the other, yet together they inform and shape the law, its interpretation and application.[23] It is important that we note for a moment how each commands the conscience of American business. But these competing concerns are relevant to our present project because they demonstrably drive and justify the law that governs the internals of the firms that do that business.

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[20] LON L. FULLER, THE MORALITY OF LAW 81-91 (1964); ROBERT C. CLARK, CORPORATE LAW § 3.4, at 124-25 (1986). Dean Robert Clark insightfully explains how we may make "*logically* consistent" the conflicting rules in the field, and then adds: "But making the concepts *practically* consistent is another matter: drawing the line between an [officer or director's] honest mistake and a negligent one can be difficult." CLARK, *supra*, § 3.4, at 124-25.

[21] The suggestion is appropriate as we approach the centennial anniversary of one of Holmes the Greater's sage observations. "For a rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[22] PRINCIPLES, *supra* note 1, pt. IV, Introductory Note a, at 135-36. The law of corporate governance balances the competing policy concerns of creative entrepreneurship and duty of care. *Id.*

[23] CLARK, *supra* note 20, §§ 3.4-.5. Dean Clark has provided a useful snapshot of these tensions, and how the courts and counsel have worked through them. *Id.*

On the one hand, we are told that American business is not performing nearly so well as once it did. Many perceive that we are being outdistanced by foreign competition. Concerns with America's competitiveness have led many to urge that the law should relax its grip,[24] that it should embrace a permissive if not a facilitative mode, that the law's attitude toward American business should be approximately that of a century ago, an era when the legal sun shone on invested capital as never before or since. This is thought necessary that our captains of commerce engage in the bold and innovative and inevitably risky ventures that are seen necessary to restore American enterprise as a whole to its former position of primacy in the NAFTA and GATT enhanced world market.

A broader context is the competitive imperative in a market economy. Imagination and nerve and risk-taking are core characteristics of effective action in such an economy. The market is not kind to the timid or those slow afoot and in its cruelty is indifferent to whether the disability be the function of burdensome legal restrictions, or the fear of costly and wasteful litigation,[25] or of some more natural cause. Both history and theory teach that there will always be losers. They teach as well that excessive concentration on the plight of the losers and providing remedies for unhappy investors have a direct and a directly adverse effect on corporate creativity and risk-taking, upon the quality of goods and services offered the public, and upon corporate profits and return on shares. Gross National Product suffers as well.

On the other hand, there are powerful and expanding accountability concerns. Our worries that directors and officers be prevented effectively from looting the corporate coffers to the detriment of (minority) shareholders are major purposes justifying our present law of corporate governance.[26] These traditional worries are as real and valid as ever. Insiders are inevitably tempted to take advantage of position, property, and information. Externally, most business torts are committed by corporations. Most of these are the product of knowing and intentional conduct by an overly zealous director or officer, which ultimately redounds to the detriment of the corporation and its ordinarily innocent shareholders.[27]

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[24] Statement of the Business Roundtable, *Corporate Governance and American Competitiveness*, 46 BUS. LAW. 241, 242-43 (1990). Many are greatly concerned that the current legal environment in this country is damaging America's ability to remain competitive against the other nations of the world. *Id.*

[25] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 102, 109 Stat. 737, 749-56. The safe harbor provisions in the Act reflect a concern over burdensome legal restrictions and needless litigation. *Id.*

Beyond this, there is a concern that American corporate enterprise be legally encouraged to pursue the public interest. It was a watershed moment in 1990 when Mississippi amended its version of the Revised Model Business Corporation Act[28] to redefine "the best interests of the corporation" that its directors may consider, *inter alia*, to include:

> (1) [t]he interest of the corporation's employees, suppliers, creditors and customers; (2) [t]he economy of the state and nation; (3) [c]ommunity and societal considerations.; [t]he long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may best be served by the continued independence of the corporation.[29]

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[26] *See* Gabriella Stern, *Polluted Numbers: Audit Report Shows How Far Chambers Would Go For Profits,* WALL ST. J., Oct. 21, 1992, at A1.

[27] James L. Robertson & David W. Clark, *The Law of Business Torts in Mississippi* (pts. 1 & 2), 15 MISS. C. L. REV. 13, 331 (1994-1995). I have recently completed a survey of the various forms of such torts. *Id.*

[28] 1990 Miss. Laws 538, § 5 (codified as amended at MISS. CODE ANN. § 79-4-8.30 (1996)).

[29] MISS. CODE ANN. § 79-4-8.30(d) (1996). *Principles* notes that a number of states have passed statutes which allow the board to take account of "other constituencies." PRINCIPLES, *supra* note 1, § 2.01 cmt. i & Reporter's Note 8. Such legally authorized altruism is not universally admired, and some authors conclude that the Revised Model Business Act should not have been amended to include "other constituencies." Statement of ABA Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion,* 45 BUS. LAW. 2253, 2253-58 (1990). This calls to mind another bit of wisdom from Holmes the Greater:

> If you want to hit a bird on the wing, you must have all your will in a focus, you must not be thinking about yourself, and, equally, you must not be thinking about your neighbor; you must be living in your eye on that bird. Every achievement is a bird on the wing.

In a very real sense, a corporate democracy is a microcosm of a political democracy. Many measure the success of the one by its profit and loss statement and the other by its gross national product. Central to understanding the legal structure and oversight of the management of the United States of America, and, indeed, of each of the fifty states, is the so-called Madisonian Dilemma—how do we accommodate majoritarian rule and individual right? Corporate democracy exists within the tensions and ambiguities of the same dilemma and, in the course of struggling within these, has come up with some rather creative innovations, such as cumulative voting.[30]

In political democracy and particularly in this country, our courts are charged to resolve the Dilemma. This is becoming increasingly so in the case of corporate democracy. Still there are differences in regulatory rule, and whether these are justified is worth a pause. I doubt anyone has ever seriously suggested that the President of the United States or the governor of a state ought to be subject to even the low level duty of care to which corporate officers are held.[31] They are similarly situated if the rule of relevant resemblances be taken seriously. Yet, no one thinks we should be able to call political executives to ac-

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Oliver W. Holmes, Jr., Speech at a Dinner Given to Chief Justice Holmes by the Bar Association of Boston, March 7, 1900, *reprinted in* THE ESSENTIAL HOLMES 79 (Richard A. Posner ed. 1992). *But see* Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 BUS. LAW. 1355, 1355-69 (1991) (discussing constituency statutes and their origin, interpretation, and effect, some of which may be negative).

[30] Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1139 n.298 (1991). How ironic, that as cumulative voting has become almost passe' within corporate democracy, Professor Lani Guinier proposes it for our political democracy. *Id.* at 1138-39. Guinier was labeled a dangerous radical and sacked as would-be Attorney General, Civil Rights Division, for such proposals.

[31] Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). Both the President of the United States and the governor of a state are afforded immunity from civil actions based on discretionary functions of their office. *Scheuer*, 416 U.S. at 247-48; *see* McFadden v. State, 542 So. 2d 871, 877-78 (Miss. 1989) (holding governor has qualified immunity to civil suit for damages).

count in courts of law for mere neglect of duty. Judge Learned Hand's famous dicta well puts the point:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.[32]

Our remedy for slothful performance by political executives is to vote them out of office at the next election. In theory and in practice a like remedy lies in corporate democracy,[33] a remedy that has been exercised of late in some of America's biggest and best known corporations. But, in addition, the positive law puts within the corporation a duty of care, and directors and officers may be called to account in the courts of this land for neglect of that duty. It is altogether noteworthy that this is so in corporate democracy where elections generally occur far more frequently than in political democracy. Of course, the unhappy investor usually has a further and often optimal remedy—he can sell his shares (at least in publicly traded corporations and even there not always at the price he desires).

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[32] Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *quoted in* Grantham v. Mississippi Dept. of Corrections, 522 So. 2d 219, 224 (Miss. 1988). Mississippi has held that public officials have qualified immunity when acting officially in discretionary duties which is only forfeited when the official acts wilfully or maliciously. *Grantham*, 522 So. 2d at 224.

[33] Shoen v. AMERCO, 885 F. Supp. 1332, 1340 (D. Nev. 1994), *vacated pursuant to settlement* (Feb. 9, 1995). One option which shareholders of corporate stock

The analogy is greater on another front. The law has long held that directors and officers have a duty of loyalty to the corporation and its shareholders, a duty often described as fiduciary or a quasi-fiduciary duty (about which we will have more to say in Part IV below). Directors and officers may not use the corporation for their personal gain but have long been thought quasi-trustees who act for the benefit of the shareholders. Conflict of interest rules perform a similar function in political democracy—the members of the general public, the taxpayers, voters and all other citizens being the shareholders of the republic. On both levels we struggle with the uneasy reality that not every technical conflict of interest yields a deleterious result. In public and private firms, it is the case more and more often that thoughtful and dispassionate persons are willing to admit there may be many so-called conflicting interest transactions that are nevertheless substantially fair and in the best interest of all concerned.

There is a final policy point. Judicial review is a blunt instrument in any context, although we often forget the fact. We expect a great deal of our courts in this country, quite often more than they may ever deliver. Juries do act upon whim or prejudice, albeit the greater danger is that within their collective experience they are simply out of their league in adjudging corporate governance claims. It is hard for a disgruntled shareholder or a defending director to secure a jury of one's peers.

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always have in dealing with unpopular or inappropriate decisions made by the corporate directors is to vote them out of office. *Shoen*, 885 F. Supp. at 1340.

We must never forget that courts and their processes at their very best seldom yield but a crude approximation of justice. But when we say this, we are referring to justice between the parties. Infinitely more difficult is judging the effect of adjudication on others. Because of the rule of precedent, every adjudication gives incentives to behavior on the part of third persons. It has been, is, and ever will be thus. Nowhere must we be more sensitive to this reality than in the law of corporate governance, where our question is whether legal incentives encourage enterprise or accountability—and how much of each and in what mix—in a world where we can have so little of what we want of each.

The Supreme Court of Mississippi seemed to sense this almost half a century ago in struggling with the corporate version of the Madisonian Dilemma.

> Corporations must be allowed to function under majority control, as do most institutions in this country, so long as the majority does no actual wrong to the minority or to others. Courts are not to be called on to operate or control them except in cases wherein such interference is essential to justice; and in interfering with what majority has done in such a case as this, real caution must be taken not to work a wrong in striving towards the right.[34]

Of course, reading and reflecting on this make clear that the court has only perceived and has not resolved the dilemma. Outside thought experiments, such as the pursuit of Pareto Optimality,[35] no one has resolved the dilemma.

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[34] Landstreet v. Meyer, 29 So. 2d 653, 656 (Miss. 1947). The supreme court reversed a decree ordering the repayment of funds paid to an agent of the corporation for services rendered to the corporation. *Landstreet*, 29 So. 2d at 656.

[35] *See, e.g.,* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 388-90 (1990) (discussing Pareto superiority and ultimately Pareto optimality as guides to legal decision making); *see also* JULES L. COLEMAN, RISKS AND WRONGS 18-21 (1992); ROBIN P. MALLOY, LAW AND ECONOMICS 38-42 (1990) (discussing Pareto efficiency and the Valdor-Hicks theory).

III. LEGAL INTERPRETATION

Our inquiry is of law. The idea is to share insights of what the courts of Mississippi and, particularly, the Supreme Court of Mississippi, are likely to do in fact in the cases about to come down the pike.[36] In the field of corporate governance, there are rules in this state that have acquired legal validity and may be brought to bear, and it is vital that we see how this should be done. The policies presented above explain and help us understand why the law takes the shape that it has. In substantial part, this law remains amorphous at many points, as will presently appear. The policies we have seen are at odds one with the other, and it is never quite clear in what mix they will emerge in the next case. Or, more important, in the next management decision that may or may not become the next case.

The rules of corporate governance are of several genera and many species. Our focus is upon the positive law of the state, such as constitutions, statutes, common law, case law, and administrative regulations. It is well to remember that the privately made law such as contracts and charters and by-laws have their important legal consequences.[37] Indeed, within lim-

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[36] Holmes, *supra* note 21, at 457. Holmes felt that the study of law encompassed the prediction of what actions the courts would take. *Id.*

[37] PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b, at 146. The point is elaborated in *Principles* commentary:

> The corporation itself is often a primary source of the functions imposed on directors and officers. A officer or director may, for example, have tasks imposed by provisions in the certificate of incorporation, in bylaws, or in a shareholders' resolution; functions may also be imposed by board resolutions or by the accepted practice of the particular corporation. For example, by assuming a new office or accepting election to a directorship or committee post, an officer or director explicitly or implicitly accepts duty of care responsibility for legally mandated functions and for functions imposed by the standards of the corporation [§ 1.36]. Often it would be advisable for the scope of such additional undertakings to be set forth in writing.

Id.

Finding cases that say corporate by-laws are enforceable is like finding cases that say contracts can be made on Tuesday. The point is so obvious and universally accepted that there is no occasion to question it. *See, e.g.,* 18 C.J.S. *Corporations* its the articles of incorporation may eliminate or limit a directors' liability under the positive law,[38] or make him whole after the fact.[39]

We pause to note the process of legal interpretation,[40] for

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§§ 111-21 (1990); 18A AM. JUR. 2D *Corporations* §§ 310-32 (1985). There are scattered expressions among the Mississippi cases that the by-laws of corporations and other private associations are enforceable, provided only that these by-laws do not offend some superior and supervening provision of law, i.e., some provision of the positive law (statute, regulations, case law), the articles of incorporation, or lawfully formed contracts. *See, e.g.*, Mississippi High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768 (Miss. 1994) (upholding enforcement of voluntary high school associations anti-recruitment rule); Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 65-66 (Miss. 1988) (stating corporate by-laws allowed removal of director); Perry v. Bridgetown Community Ass'n, 486 So. 2d 1230 (Miss. 1986) (addressing issue whether amendments to by-laws allowed removal of director); National Collegiate Athletic Ass'n v. Gillard, 352 So. 2d 1072 (Miss. 1977) (discussing rules of voluntary association of college and universities); Dixie Elec. Power Ass'n v. Hosey, 208 So. 2d 751, 753-54 (Miss. 1968) (addressing non-profit electric power association's authority to make and enforce by-laws regulating charter-protected right of members to vote by proxy); Lowery v. International Bhd. of Boilermakers, 130 So. 2d 831, 837 (Miss. 1961) (addressing by-laws of labor unions regulating conduct of members); Board of Comm'rs v. Collins, 59 So. 2d 351, 353 (Miss. 1952) (discussing authority of Mississippi State Bar to make by-laws setting quorum for meetings of board of commissioners).

[38] MISS. CODE ANN. § 79-4-2.02(4) (1996).

[39] *Id.* § 79-4-2.02(5).

[40] Robertson & Clark, *supra* note 27, pt. 1, at 24-57. In bits and pieces I have over the years struggled to articulate an intelligible approach to the interpretation of legal phenomena. *Id.* Extra judicially, I have done this through a series of articles. *Id.*; *see, e.g.*, James L. Robertson, *Myth and Reality-Or, Is It "Perception and Taste" In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045, 1045-47 (1993) (advocating circumstanced external approach for interpreting donative documents); James L. Robertson, *Of Bork and Basics*, 60 MISS. L.J. 439 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)); James L. Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure*, 8 MISS. C. L. REV. 111, 111-12 (1988) (interpreting Rule 11 of the Mississippi Rules of Civil Procedure and discussing its proper role); Amy D. Whitten & James L. Robertson, *Post-Custody, Pre-Indictment Problems of Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 247-48 (1988) (proposing principled approach to pre-trial process and correlative legal rights involved). Within my more constrained judicial role, I often spoke to the point. Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 651-53 (Miss. 1991) (Robertson, J., dissenting) (interpreting "lands" to provide surface and sub-surface interests); *see, e.g.,* Thornhill v. System Fuels, Inc., 523 So. 2d 983, 1003-09 (Miss. 1988) (Robertson, J., concurring) (discussing legal interpretation of terms impacting case); Cuevas v. Royal D'Iberville

it is essential to the right use and understanding of all that follows. Each effort at interpreting a rule of law begins with—and is ever subject to critique by reference to—the valid text; that is, the language that has been enacted and thus formally made a part of the law. Only that, and all of that, which has satisfied the criteria of legal validity (CLV),[41] forms a part of the legal text so that it confers legal powers and rights and is a legitimate object of legal interpretation. Because of the highly generalized and at times even abstract language used in rules of law, competent interpretation is imperative, and this is particularly so where, as here, the implicit policy judgments may be multiple and at odds with one another. The job is tough enough in the case of generally worded statutes, such as those articulating the duties of corporate directors and officers.[42] The standards there seem almost aspirational in nature instead of liability-imposing rules of law. The matter is more difficult at the level of common law and case law, where we seek from each case the narrowest reading of the rule of decision which, ap-

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Hotel, 498 So. 2d 346, 357-58 (Miss. 1986) (Robertson, J, dissenting) (advocating statutory interpretation should seek to provide "best fit" today, not date statute enacted); Grisham v. Hinton, 490 So. 2d 1201, 1208-09 (Miss. 1986) (Robertson, J., concurring) (concluding common law is lagging behind statutory law in area of awards of attorneys fees and expenses). Then there were days when my efforts were more compromised by the need to command a majority of the court. Richardson v. Canton Farm Equip., Inc., 608 So. 2d 1240, 1250 (Miss. 1992) (stating interpretation of conflicting statutes requires objective reading providing coherent meaning which best fits texts, and is justified given political history of statute); *see, e.g.,* Simmons v. Bank of Miss., 593 So. 2d 40, 43 (Miss. 1992) (stating interpretation of lease clauses must seek most coherent meaning justified by language of clauses); Mississippi Ins. Guar. Ass'n v. Vaughn, 529 So. 2d 540, 542 (Miss. 1988) (construing MISS. CODE ANN. § 83-23-105 (1972)); J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851, 857 (Miss. 1986) (interpreting Article 2 of the Uniform Commercial Code); *In re* Brown, 478 So. 2d 1033, 1039-40 (Miss. 1985) (discussing interpretations of right to privacy). All that I say here should be seen and understood against the backdrop of the ideas expressed in these disparate sources and settings.

[41] H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961). The criteria include authoritative texts, legislative enactments, customary practices, general declarations and past judicial decisions. *Id.* at 97. Common modern legal criteria include constitutions, statutes, and case law. *Id.* at 98.

[42] MISS. CODE ANN. §§ 79-4-8.30, 8.42 (1996) are examples of such generally worded statutes.

plied to the facts, would yield the judgment of the court,[43] and then assimilate a series of such rules into a coherent prediction of what a competent court understanding the process will likely do in fact in the next case.[44] Judgment and discretion are inevitable. The legal text is and must be our ultimate referent when questions of meaning and application are presented, for fidelity to law demands nothing less than that any interpretation of a legal text first and foremost fit that text rather than some other text we may wish we had before us.

There is more to law than text. Experience and thought have long taught there are invariably organizing principles that suggest the good sense of most CLV-approved texts. However confident we are of our understanding, there is a mental exercise we must pursue periodically. We must identify all of the valid rules in the field of corporate governance. These are all of the rules of whatever genera or species or form that satisfy the law's criteria for legal validity (CLV).[45] We divine and understand the underlying principles which best explain these rules in the aggregate and best cohere among each other. This is particularly important in corporate governance in Mississippi, where there is not nearly so much law as in other states and where what we have is often so general in form and so imprecise, if not confused, in its wording. In such a setting, these underlying principles must serve as our bedrock for filling the gaps[46] necessary to just adjudication in given cases and en route resolving the uncertainties inevitably a part of any system of legal rules. These principles interact electromagnetically among each other. Their combined electromagnetic force gives life to other principles and rules.

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[43] The law of corporate governance has an exemplar in *Smith v. Van Gorkom*, where the court gave lip service to a gross negligence standard for the directors' duty of care, augmented by the business judgment rule, en route to a judgment readily seen as respecting neither. Smith v. Van Gorkom, 488 A.2d 858, 864 (Del. 1985); *see also* CLARK, *supra* note 20, §§ 3.4-.5 (explaining some important corporate governance cases).

[44] Holmes, *supra* note 21, at 457. One must be able to interpret past rulings to predict future court rulings. *Id.*

[45] Robertson & Clark, *supra* note 27, pt. 1, at 27 n.70. The criteria are twofold: (1) rule-making authority, and (2) made in accordance with other valid rules of law. *Id.* at 28. The criteria apply to public law (constitution, statutes, etc.) and to private law (contracts, wills, etc.). *Id.*

[46] *But see* Galloway v. Travelers Ins. Co., 515 So. 2d 678, 685-86 (Miss. 1987) (Robertson, J., concurring) (discussing filling gaps in law by reference to economic realities).

There is a central motion, common to all rules of law. Imbedded within each rule is a purpose, one or more reasons explaining its creation, but, more important, justifying its present existence. We should seek legal meaning in the present and we begin, not necessarily with what its author(s) in fact had in mind way back when, but with the most sensible purpose and justification that a hypothetically omniscient, worldly wise author drafting that rule may have had in mind at the moment. We come forward and inform our judgment with the insights of today. This is important to keep in mind as we address the decades-old duties of care and loyalty in their most recent statutory expressions. We seek the best justification that may be found for those rules today.[47] We lawyer best when we afford each rule a circumstanced external reading that best *fits and justifies* that rule *today*.[48]

I have made the case for an external approach to legal interpretation in a variety of contexts.[49] Law imposes objective standards and uses these to measure the conduct of litigants and this is so in fact though the lawmaker says he seeks the subjective. Of course, there remain many who resist. Even the ALI *Principles* tell us their black letter components of the duty of care imports a subjective as well as an objective dimension,[50] although reflection shows this is not so.

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[47] Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 357-58 (Miss. 1986) (Robertson, J., concurring); *see also* RONALD DWORKIN, LAW'S EMPIRE 318-27 (1986) (examining and evaluating intentions behind enactment of laws). A case can be made that S. 2389, Reg. Sess., 1994 Miss. Laws 645, "clarifying" the duty of care of bank directors, was blatant, special interest legislation. The banks had the clout, and the legislature enacted. No court may consider this en route to proper interpretation. Rather, courts are obliged to read these "clarifying" rules as positive additions to the law, bringing to bear the best policy justifications that may be found, and forging as much symmetry as possible with other rules in the field.

[48] I have often borrowed Ronald Dworkin's notion presented in his *Law's Empire* that legal interpretation has two dimensions: the dimension of fit and the dimension of justification. DWORKIN, *supra* note 47, at 318-27; *see, e.g.*, Dye v. State *ex rel.* Hale, 507 So. 2d 332, 342 (Miss. 1987) (arguing constitutional provisions should be interpreted in manner which best fits language and is justified by current policy considerations); Frazier v. State *ex rel.* Pittman, 504 So. 2d 675, 710 (Miss. 1987) (Robertson, J., concurring in part and dissenting in part) (interpreting Section 109 of the Mississippi Constitution); Hall v. Hilbun, 466 So. 2d 856, 867-69 (Miss. 1985) (applying recent changes of other jurisdictions to Mississippi medical malpractice law). I do so again. As before, I make no promise I define or use these dimensions as Dworkin would.

[49] Robertson & Clark, *supra* note 27, pt. 1, at 24-57. Legal rules should be

The search for intent in whatever context is invariably a search for indicia of intent. A statement that a legislature intended this or that is not and cannot be but a statement that a reasonable legislature providing this CLV-approved text under these circumstances would most likely have meant this or that. The theoretical underpinning of the interpretive and applicative phases of our law of corporate governance ought be declared what it has been, is, and will ever be: the reading of valid legal texts—and the application thereof—by circumstanced external standards. The same may be said of a corporate director or senior executive who did this or that in his corporate capacity and whose conduct is being examined under the judicial lens for motive and possible malice.

It is demonstrable that we enhance the chance the law will well play its instrumental role when we relate and premise it upon the empirical and social realities of the phenomena we seek to regulate. In the field of corporate governance, these phenomena are behavioral and economic. In today's context, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored . . .,"[51] as well they ought to be. It is only common sense that the court should give the back of its hand to a claim "that simply makes no economic sense,"[52] nor is there any legal sense in limiting

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interpreted with an eye toward their current applicability in different contexts. *Id.*

[50] PRINCIPLES, *supra* note 1, § 4.01(a) cmt. f. The special skills and expertise of a corporate director or officer are accorded weight in determining whether there has been a breach of the officer's duty of care. *Id.*

[51] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67 (1992). The United States Supreme Court expressed its preference of a case-by-case analysis approach in deciding issues such as antitrust claims where a close evaluation of economics is necessary. *Eastman Kodak Co.*, 504 U.S. at 467.

[52] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court determined that claims not supported by economic rationality

this injunction to antitrust cases. We should apply it throughout the realm of corporate governance, as will presently appear.

We have noted above and we will discuss below a number of rules, but the reading that the rules require is not one we may literally or fully give them. In writing rules, we may never wholly escape our relative ignorance of fact nor correct the relative indeterminacy of our aim.[53] Open-texturedness is and will remain the order of the day.[54] This will appear time and again in what follows—the duty of care, the business judgment rule, and the duty of loyalty. This is so both in making and interpreting law, and it serves well to explain our preference for a circumstanced external approach to reading rules of law. Over-inclusiveness and under-inclusiveness attend all efforts to produce within law hard edged, case decider rules, and inevitably infect the system with more than a measure of official arbitrariness. "Rules make dichotomous cuts in continuous phenomena."[55] Yet when we see this and, as here, move to avoid it by moving to a more generalized form of legal directives, the inexorable results are inconsistencies, lack of predictability, and ad hoc judgments[56]—results no less arbitrary and unde-

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must be supported by further evidence. *Zenith Radio Corp.*, 475 U.S. at 587; *see also* Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324, 330-31 (Miss. 1992) (stating it was impossible to infer party intended not to honor licensing agreement). This, of course, assumes that courts and the judges who serve them accept their duty to inform themselves so that they have a pretty good idea what does and what does not make economic sense.

[53] HART, *supra* note 41, at 125. It would be impossible to make rules which would envision every possibility or situation which could arise. *Id.*

[54] *Id.* at 121-32. "Open texture" refers to that quality of indefiniteness in application. *Id.* at 124. All devices, precedent or statutes, chosen for the communication of standards of behavior, will eventually prove indeterminate when applied to a certain factual situation. *Id.*

[55] POSNER, *supra* note 35, at 46. Legal rules leave little room for change which may be called for by changes in the world from the time the rules were made. *Id.*

[56] *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976) (discussing private law decisions and opposed modes of legal solutions to substantive problems: general rules and equitable standards); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379-81 (1985) (analyzing arguments for and against legal rules and general legal standards).

sirable that we label them unofficial arbitrariness. These thoughts reinforce our view that it is well we seek what the law means, not what the lawmaker meant.

Legal interpretation in the field of corporate governance in Mississippi has a special dimension we need note before we proceed. Very little of the Mississippi law of corporate governance is home grown. Relatively speaking, our state has seen little litigation in the area. You can count the significant reported decisions in the field on the fingers of both hands. What we observe when we examine the corporate law-making process in Mississippi is that there is regular resort to extra-Mississippi sources.

Mississippi resorted to the ABA's Model Business Corporation Act and enacted it in 1962.[57] In 1987, we again looked to the experts across the country as we enacted the Revised Model Business Corporation Act and, as noted above,[58] we have regularly absorbed into our statutory law the ABA's revisions and updates to the Revised Model Act.[59]

What case law we have reflects a comparable pattern. The early duty of care cases invariably cite and rely on decisions in other jurisdictions[60] and on treatises and legal encyclopediae.[61] Fast forward to *Knox Glass Bottle Co. v.*

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[57] 1962 Miss. Laws 235. The title of the relevant chapter in the Mississippi Code is Corporations, Associations, and Partnerships. MISS. CODE ANN. § 79-1-1 (1996).

[58] 1987 Miss. Laws 486. Title 79 of the Mississippi Code contains the revised act. MISS. CODE ANN. § 79-4-1.01 to -17.04 (1996).

[59] Statutorily, Mississippi law also includes, *inter alia*, the Uniform Securities Act, title 75, chapter 71 of the Mississippi Code, and the Uniform Commercial Code-Investment Securities, title 75, chapter 8 of the Mississippi Code.

[60] Boyd v. Applewhite, 84 So. 16, 22-23 (Miss. 1920) (citing common law cases from the United States Supreme Court). The Supreme Court of Mississippi has also cited to cases from Illinois, Missouri, Maryland, New York, Pennsylvania and several federal courts in construing the duty of care. Ventress v. Wallace, 71 So. 636, 642 (Miss. 1916); Ellis v. H.P. Gates Mercantile Co., 60 So. 649, 650-51 (Miss. 1913).

[61] *E.g.*, *Ventress*, 71 So. at 638-39, 642 (quoting from corporation and banking treatises). The *Ellis* case quoted from *The Law of Private Corporations* and *Banks and Banking*. *Ellis*, 60 So. at 650-51.

Underwood,[62] and we find the pattern continued. The Court cites *Pepper v. Litton*,[63] and quotes liberally from Fletcher's *Corporations*.[64] More recently, *Omnibank of Mantee v. United Southern Bank*,[65] continues the practice with extensive citations to and quotations from the latest work in the field, first and foremost, the American Law Institute's *Principles of Corporate Governance*.[66] Our leading case on the corporate opportunity doctrine draws heavily on Minnesota case law.[67] We think it fairly predictable that this state will continue to treat statutes, decisions, and scholarly work from outside our geographical confines as important sources of the Mississippi law of corporate governance.[68]

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[62] 89 So. 2d 799 (1936).

[63] 308 U.S. 295 306 (1930). In *Pepper*, the Supreme Court held that when a shareholder's transactions are challenged, he must prove the good faith and inherent fairness of the transaction. *Pepper*, 308 U.S. at 306-07.

[64] *Knox Glass Bottle Co.*, 89 So. 2d at 813-15. The court also cites to *Stevens Corporation*, *Thompson on Corporation*, and *Corpus Juris Secundum and American Jurisprudence on Corporations*. *Id.* at 815-16.

[65] 607 So. 2d 76 (Miss. 1992).

[66] *Omnibank of Mantee*, 607 So. 2d at 87-88, 90. For a far-reaching summary of Mississippi's reliance on the works of the American Law Institute, see Robertson & Clark, *supra* note 27, at 21 n.41.

[67] Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332-33 (Miss. 1979). This case quotes and relies on Miller v. Miller, 222 N.W.2d 71, 81 (Minn. 1974). *Ellzey*, 376 So. 2d at 1332-33.

[68] The following is a more comprehensive list of the available and credible extra-Mississippi sources of law the Supreme Court of Mississippi has drawn upon for the content of the rules of corporate law and governance that the court has promulgated and enforced in this state:

(1) *The decisions of the federal courts sitting in Mississippi. See, e.g.*, Home Tel. Co. v. Darley, 355 F. Supp. 992 (N.D. Miss. 1973), *aff'd* 489 F.2d 1403 (5th Cir. 1974), *cited in Omnibank of Mantee*, 607 So. 2d at 85;

(2) *The Supreme Court of the United States. See, e.g.*, Pepper v. Litton, 308 U.S. 295 (1939), *cited in Ellzey*, 376 So. 2d at 1335; *Knox Glass Bottle Co.*, 89 So. 2d at 813-14; Bentz v. Vardaman Mfg. Co., 210 So. 2d 35, 41 (Miss. 1968);

(3) *Cases from other state jurisdictions. See, e.g.*, *Miller*, 222 N.W.2d at 71, *cited and quoted in Ellzey*, 376 So. 2d at 1332; Orchard v. Covelli, 590 F. Supp. 1548, 1556-57 (W.D. Pa. 1984), *aff'd*, 802 F.2d 448 (3d Cir. 1986), *cited and quoted in* Fought v. Morris, 543 So. 2d 167, 170-71 (Miss. 1989);

(4) *Treatises. See, e.g.*, 3 CHARLES R.P. KEATING ET AL., FLETCHER CYCLOPEDIA CORPORATIONS: LAW AND PRACTICE (rev. ed. 1994), *cited in* Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 66 (Miss. 1988); Cooper v. Mississippi Land Co., 220 So. 2d 302, 307 (Miss. 1969); *Knox Glass Bottle Co.*, 89 So. 2d at 813-15;

One point deserves special emphasis. Over the past ten-plus years, the law of corporate governance has been the beneficiary of enormous intellectual energy and deliberate processes by diverse and sundry official and not so official personages. The ALI's Corporate Governance Project was brought to fruition in 1993. Many minds spent countless hours drafting, debating, examining and revising and ultimately publishing the product of one of the great collaborative and deliberative efforts of the ages, an effort we might add, put forth in the fish bowl and glare of highly public scrutiny and commentary.[69]

Not that the ALI project has been accepted as from on high. The ABA Committee on Corporate Laws continues apace with its never ending revisions to the Revised Model Business Corporation Act—"the [l]aw as it is is a continuous process of becoming."[70] Acknowledging that the ALI has set the agenda, the Committee presses forward with all deliberate speed with its own drafting, again amidst continuing public commentary.[71] The point is simple and limited. To the extent that pro-

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F. HODGE O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE (3d ed. 1987), *cited in Fought*, 543 So. 2d at 169, 172; ROBERT A. STEVENS & ARTHUR LARSON, CORPORATIONS (1936), *cited in Knox Glass Bottle Co.*, 89 So. 2d at 816; SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS (3d ed. 1927), *cited in Knox Glass Bottle Co.*, 89 So. 2d at 816; Ellis v. H.P. Gates Mercantile Co., 60 So. 649, 650 (Miss. 1913).

(5) *Legal Encyclopediae. See, e.g.,* 13 AM. JUR. *Corporations* (1938), *cited in Knox Glass Bottle Co.*, 89 So. 2d at 816; 19 AM. JUR. 2D *Corporations* (1965), *cited in* Bentz v. Vardaman Mfg. Co., 210 So. 2d 35, 40 (Miss. 1968); 19 C.J.S. *Corporations* (1990), *cited in* Turner v. Wilson, 620 So. 2d 545, 548-49 (Miss. 1993); Hill v. Southeastern Floor Covering Co., 596 So. 2d 874, 877 (Miss. 1992).

(6) PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994), *cited in Omnibank of Mantee*, 607 So. 2d at 84; Derouen v. Murray, 604 So. 2d 1086, 1091 n.2 (Miss. 1992).

[69] William J. Carney, *The American Law Institute's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 898, 902-15 (1993). "The Corporate Governance Project can be characterized as expanding the role of fiduciary duties of various participants in firms . . . ." *Id.* at 899.

[70] Henry M. Hart, Jr., *Holmes' Positivism-An Addendum*, 64 HARV. L. REV. 929, 930 (1951); *see also* OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881) ("In order to know what [the law] . . . is, we must know what it has been, and what it tends to become.").

[71] *See* Kathryn N. Fine, *The Corporate Governance Debate and the ALI Proposals: Reform or Restatement*, 40 VAND. L. REV. 693, 695-700 (1987) (discussing

cess can and should inspire confidence, the recent work in corporate governance should as no other. If ever there were a field where the lawmakers, those charged and entrusted with the criteria for legal validity and the best use thereof, should defer to the work from afar, this is it. There is good reason why the legislature and courts of this state should and will continue upon the course noted above.

IV. The Fiduciary Model

We need to pursue for a moment one of the premises just pressed: putting square pegs into round holes, and the consequences thereof. We refer to a familiar experience within the development of our law. Legal reasoning seeks the analogy and in substantial part it should: herein of the rule of relevant resemblances. We are most prone to pursue the analogy when we confront the question of first impression. Fallible judges from time to time press a false analogy. When this occurs, the law often produces distorted results. It strains as it confronts the force of the realities of the phenomena it seeks to regulate. We refer to the heavy reliance on fiduciary theory in the law of corporate governance.

Holmes the Greater has shared with us many profound truths, not all in the realm of the law. In the law, as elsewhere, he has taught us that "a page of history is worth a volume of logic."[72] The lesson helps us understand the marriage in the law of corporate governance of the duties of directors and officers to the trust model. The law of corporate governance devolves two broad, general duties upon corporate directors and

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whether ALI's codification of common law constitutes proposal of reforms); Elliott Goldstein, *The Relationship Between the Model Business Corporation Act and the Principles of Corporate Governance: Analysis and Recommendations*, 52 GEO. WASH. L. REV. 501, 502 (1984) (analyzing reception, history and interdependence of two projects); Michael R. Schwenk, Note, *Valuation Problems in the Appraisal Remedy*, 16 CARDOZO L. REV. 649, 653 (1994) (examining corporate law doctrines in context of appraisal valuation).

[72] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). The court disposed of a taxation issue by examining the practical and historical fact of how the tax had always been regarded. *New York Trust Co.*, 256 U.S. at 349.

officers: a duty of care and a duty of loyalty.[73] The duty of care addresses the director or officer in his disinterested conduct, in acting where he has no conflict of interest. The duty of loyalty speaks to self-interested conduct, to those matters to which the director or officer attends where he also has a personal interest.[74]

Not unlike other states, Mississippi early began forcing these duties into the trust model. *Ventress v. Wallace*[75] held corporate directors occupied a fiduciary relation toward the corporation and its shareholders and traced the trustee analogy back to the early case of *Payne v. Bullard*.[76] In the end, *Ventress* declared "It is not the purpose of this opinion to declare directors of a corporation trustee of an express trust,"[77] nor should it have been, but the mischief was afoot.[78]

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[73] Some see three separate and distinct duties. EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS § 2:01 (1995); 1 WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1-5, at 11-12 (5th ed. 1993). Officers and directors "owe three basic duties to the corporations they serve: obedience, diligence, and loyalty." KNEPPER & BAILEY, *supra*, § 1-5, at 11; *see also* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1164 (Del. 1995) ("[T]riad of fiduciary duties: good faith, loyalty, . . . [and] due care.").

[74] Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 438 (1993). "The duty of care is imposed under the general heading of negligence." *Id.* at 439. The duty of loyalty requires the officers to act fairly. *Id.* at 450.

[75] 71 So. 636 (1916).

[76] 23 Miss. 88, 90 (1851). The early analogy was that the law implied a fiduciary relationship in some circumstances, amounting to an express trust. *Ventress*, 71 So. at 642.

[77] *Ventress*, 71 So. at 642. The court held that the facts of each particular case should govern. *Id.*

[78] The cases are legion wherein the court uses the word and label "fiduciary" in describing the relationship between a corporate director and officer and the corporation which he serves, and, as well, the nature of the duty the director or officer owes to those within the corporate family, such as minority shareholders. *See, e.g.*, Derouen v. Murray, 604 So. 2d 1086, 1092 (Miss. 1992); Fought v. Morris, 543 So. 2d 167, 171 (Miss. 1989) ("[D]irectors and officers of a corporation stand in a fiduciary relationship to the corporation and its stockholders."); Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1331, 1332 (Miss. 1979). A number of these cases say that, though not trustees in a technical sense, directors and officers are in a fiduciary relationship with the corporations and intracorporate personages they serve. *See, e.g.*, Home Tel. Co. v. Darley, 355 F. Supp. 992, 999 (N.D. Miss.

In *Knox Glass Bottle Co. v. Underwood*,[79] the court said "the directors and other officers of a corporation, while not trustees in the technical sense in which that term is used, occupy a fiduciary relation to the corporation and to its shareholders."[80] This kind of talk is somewhat understandable, as the great majority of our reported cases have addressed circumstances where directors or officers have pursued personal gain and self-dealing, compromising if not excluding the best interests of the corporation, and the few duty of care cases that we have are all bank cases.[81]

1973) (holding officers of corporation owed corporation fiduciary duty while in control of corporation); Bentz v. Vardaman Mfg. Co., 210 So. 2d 35, 40 (Miss. 1968) (citing Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799 (Miss. 1956)); *see also* Rice Researchers, Inc. v. Hiter, 512 So. 2d 1259, 1269 (Miss. 1987) ("[W]hile Williams was an officer and director of [the corporation], he occupied a trust relationship and owed a fiduciary duty to the corporation."); Planhouse, Inc. v. Breland & Farmer Designers, Inc., 412 So. 2d 1164, 1166 (Miss. 1982) (same). Often cited and quoted is Pepper v. Litton, 308 U.S. 295 (1939), where the Court said:

> [H]e who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.

Pepper, 308 U.S. at 311 (footnotes omitted). The word "fiduciary" seemingly appears in every other sentence in the recent Delaware decision of Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995).

[79] 89 So. 2d 799 (1956).

[80] *Knox Glass Bottle Co.*, 89 So. 2d at 814. The court included a duty to refrain from retaining personally any profit made through the corporation in its definition of the quasi-trustee fiduciary duty. *Id.* at 814-15.

[81] *See, e.g.*, Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84 (Miss.

There are problems with this kind of talk, and they are serious. For one thing, notions of fiduciary relationships import a regime of strict judicial scrutiny, the fiduciary seeking to defend what he has done, burdened with demanding standards of proof.[82] This may not be so bad in duty of loyalty cases, but it seems somewhat jarring in duty of care cases, where corporate democracy augmented market forces are a far more appropriate and effective regulator.

Then there is the conservatism with which the law has always regarded trustees. Above all, the trustee's role is to preserve the trust estate. He is permitted to make prudent investments,[83] but we have traditionally thought those limited to investments attended by little or no risk. While the rule of law today may be a bit more realistic and permissive,[84] perennial prejudices persist. The official comment to the RMA "does not use the term fiduciary" in the standard for directors' conduct because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation."[85] The ALI seems to recognize the problem when it reports, "Directors, officers, and other persons who control corporations have fiduciary duties that are not necessarily the same as those owed by trustees."[86] Perhaps the word fiduciary

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1992) (holding director/officer has duty to perform functions with care ordinary prudent person would be expected to exercise); Ellis v. H.P. Gates Mercantile Co., 60 So. 649, 650 (Miss. 1913) (holding officers are required to "use as much diligence and care as the proper performance of the duties of their office requires").

[82] Smith v. Smith, 574 So. 2d 644, 651 (Miss. 1990). The burdens and penalties of the confidential, fiduciary relationship are severe. *Smith*, 574 So. 2d at 651.

[83] MISS. CODE ANN. §§ 91-9-107, 91-13-3 (1994). The statutes permit the trustee to exercise the same care as prudent men handling their own affairs. *Id.*

[84] RESTATEMENT (THIRD) OF THE LAW OF TRUSTS § 174 (1996). The prudent-investor rule requires the trustee to act with ordinary care according to the circumstances as they appear to him at the time. *Id.* at 449.

[85] Official Comment to RMA § 8.30(a).

[86] PRINCIPLES, *supra* note 1, pt. V, Introductory Note a, at 199. However, in closely held corporations, directors and officers may have duties analogous to "those in partnerships." *Id.* at 199-207. Note here the important recent expression of the Delaware Court of Chancery:

speaks to the devotion the director or officer must bring to his duty without informing of the substantive content of that duty. What is important to understand—and what the trust model cannot accommodate—is that the fundamental function of the corporation is to make money, not merely conserve it.[87] With few and limited exceptions, a business corporation should have as its objective "to conduct business activities with a view to enhancing corporate profit and shareholder gain."[88] The Delaware Court of Chancery was on target when it recently wrote "an unwillingness to take risks prudently is inconsistent with the role of a diligent director.[89] So seen, forcing duty of care claims into the trust/fiduciary model really is like forcing a square peg into a round hole.

Yet this is the model *Ventress* announced and *Knox Glass Bottle Co.* pursued, and it is everywhere.[90] Relying heavily upon recognized treatises in the field, the court has repeatedly stated that corporate directors and officers "occupy a fiduciary relation to the corporation and to its stockholders."[91]

> The trustee's role is, classically, quite different [from the role of the corporate director]. The role of the trustee is prudently to manage assets placed in trust, within the parameters set down in the trust instrument. The classic trusteeship is not essentially a risk taking enterprise, but a caretaking one. Hence, while trustees may be surcharged for negligence, a corporate director is only considered to have breached his duty of care in instances of gross negligence.

Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1148 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995). The point packs punch, coming as it does from the state acknowledged as the most experienced in corporate governance matters. See E. Norman Veasey, *The National Court of Excellence*, 48 BUS. LAW. 357, 357 (1992) (calling Delaware Courts of Chancery finest in nation).

[87] PRINCIPLES, *supra* note 1, pt. V, Introductory Note a, at 199. The duty of loyalty in a pecuniary setting is sometimes referred to as a duty of fair dealing. *Id.*

[88] *Id.* § 2.01 cmt. f, at 57. This objective is referred to as the economic objective. *Id.*

[89] *Cinerama, Inc.*, 663 A.2d at 148.

[90] Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799, 814-15 (Miss. 1956); Ventress v. Wallace, 71 So. 636, 639 (Miss. 1916). Both the *Ventress* and *Knox Glass Bottle Co.* cases likened the directors and officers' relationship with the corporation to that of a fiduciary or quasi-trustee. *Knox Glass Bottle Co.*, 89 So. 2d at 814-15; *Ventress*, 71 So. at 639.

[91] *Knox Glass Bottle Co.*, 89 So. 2d at 814. "[T]he accountability of a director

Analogizing to the law of trusts, the court quoted treatise authority to the effect that the corporation is "entitled to the disinterested management and judgment of the" directors and officers.[92] The cases that followed concerned varying species of the duty of loyalty and, for better or for worse, continued to employ the language and concept of fiduciary relations and duties as though there were no other kind.[93]

The separate and dual nature of the two duties—the duty of care and the duty of loyalty—did not receive explicit recognition[94] in Mississippi until *Derouen v. Murray*.[95] There the court noted the statutory source of the two duties but cited as well their recent elaboration in the American Law Institute's *Principles of Corporate Governance*, Parts IV & V.[96] An expanded recognition of the two disparate duties followed in *Omnibank of Mantee v. United Southern Bank*,[97] which observed "[t]hese duties differ in nature and content, though they doubtless intersect and overlap."[98] True and a perceptive step,

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of a corporation is determined by the strict standards of rectitude that bind a fiduciary . . . ." *Id.* at 815.

[92] *Id.* at 815. "[W]here an officer or director represents both himself and the corporation, the contract is voidable . . . ." *Id.* at 815-16.

[93] *See, e.g.,* Hill v. Southeastern Floor Covering Co., 596 So. 2d 874, 877 (Miss. 1992) (holding officer of corporation could not appropriate for himself corporation business opportunities); Fought v. Morris, 543 So. 2d 167, 171-72 (Miss. 1989) (holding officer of corporation violated fiduciary duty when he purchased stock to which corporation had first right of refusal); Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979) (holding officer of corporation violated fiduciary duty by usurping corporation business opportunities for personal gain).

"Fiduciaries . . . must be held to something stricter than the morals of the market place." *Ellzey*, 376 So. 2d at 1332 (citing Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).

[94] Holmes the Lesser had presented them separately six years earlier in law journal commentary. Holmes, *supra* note 19, pt. 1, at 188-202 (duty of care), 202-11 (duty of loyalty).

[95] 604 So. 2d 1086, 1092 (Miss. 1992).

[96] *Derouen*, 604 So. 2d at 1092 (citing PRINCIPLES, *supra* note 1, § 4.01). The book constitutes the position of the Institute on matters of corporate governance. Geoffrey C. Hazard, Jr., *Director's Foreword* to PRINCIPLES, *supra* note 1, at IX.

[97] 607 So. 2d 76, 84-85 (Miss. 1992).

[98] *Omnibank of Mantee*, 607 So. 2d at 84. "The law devolves upon those in the upper echelons of a corporate entity certain duties . . . over and above those of an ordinary agent or employee . . . ." *Id.*

but no Mississippi case has yet seen in sharp relief the divergent policy imperatives for low scrutiny judicial review in duty of care cases and, in contrast, much stricter scrutiny review in duty of loyalty cases. Yet this dichotomy must be understood and respected if we wish the law of corporate governance to operate optimally, to regard the realities of the phenomena under regulation and, in the long run, to do us all more good than harm.

Our most explicit rejection of the fiduciary model is found in the burden of proof norms we accept in duty of care cases. The ALI *Principles* make clear that the person challenging the director or officer's exercise of his duty of care has the burden of production and persuasion.[99] By way of contrast, ordinary fiduciary duty litigation finds the defendant, once saddled with the duty, compelled to justify and defend his actions and by clear and convincing evidence at that.[100] Even if this fails to capture completely our law governing duty of loyalty cases where informed ratification and objective fairness to the corporation will defeat a plaintiff's claim.[101]

V. THE DUTY OF CARE

A. *The Beginnings Of The Duty In Mississippi*

The duty of care finds its earliest judicial expression in this state in *Ellis v. H.P. Gates Mercantile Co.* .[102] The directors of a failed bank argued they could not be held liable for losses sustained on account of their negligence in managing the affairs of the bank. Quoting Thompson on Corporations, the *Ellis* court rejected the contention and held that directors are indeed responsible

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[99] PRINCIPLES, *supra* note 1, § 4.01(c) cmt. d, at 176-77. The challenger has the task of proving the business judgment rule inapplicable. *Id.*

[100] Smith v. Smith, 574 So. 2d 644, 651 (Miss. 1990). Once the claimant has established the existence of a fiduciary relationship, impropriety is presumed, and the trustee must prove his actions were proper by clear and convincing evidence. *Smith*, 574 So. 2d at 651.

[101] MISS. CODE ANN. § 79-4-8.61 (1996).

[102] 60 So. 649 (Miss. 1913).

> for loss resulting from the wrongful acts or omissions of other directors or agents, where such loss was a consequence of their own neglect of duty, either in failing to supervise the company's business with proper attention or in neglecting to use proper care in the appointment of such agents.[103]

Again quoting Thompson, the *Ellis* court announced the content of the director's duty of care as the "same degree of care and prudence which is generally exercised by businessmen in the management of their own affairs."[104] In *Ventress* and *Boyd* the court cited *Ellis* and the Thompson treatise and began using the word "negligence" as a label for those acts or omissions which would expose a director or officer to liability.[105]

Several defenses often suggested by directors and officers called to account have been consistently rejected. Neglect of duty may not be excused by ignorance, or inexperience, or incompetence.[106] Nor is a director's duty lessened that he serves without pay.[107] The day of the honorary corporate director is long gone.[108]

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[103] *Ellis*, 60 So. at 650. The court rejected the directors' argument that they were ignorant of the employee's incompetence, and charged them with constructive knowledge. *Id.*

[104] *Id.*; *see also* Bowerman v. Hammer, 250 U.S. 504, 511-12 (1919) (holding bank director liable for losses resulting from inattention to acts of officers); Briggs v. Spaulding, 141 U.S. 132, 152 (1891) (holding bank directors should not be shielded from liability because of ignorance, if that ignorance is result of gross negligence). Mississippi has also refused to absolve bank directors of liability because of ignorance of wrongdoing, if that ignorance could have been rectified by proper diligence and inquiry. Boyd v. Applewhite, 84 So. 16, 23 (Miss. 1920) (liability rule where bank became insolvent under director's neglect).

[105] *Boyd*, 84 So. at 24; Ventress v. Wallace, 71 So. 636, 640 (Miss. 1916). The court in *Ventress* and *Boyd* recognized that the suits were based on common law theories of negligence. *Boyd*, 84 So. at 24; *Ventress*, 71 So. at 640.

[106] *Ellis*, 60 So. at 650. "[I]mprudence and negligence cannot be excused on the ground of ignorance or inexperience or the honesty of intention." *Id.*; *see also* Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 89 (Miss. 1992), 607 So. 2d at 89; *Boyd*, 84 So. at 22.

[107] *Ellis*, 60 So. at 650. "[T]he fact of service without compensation does not permit a less degree of activity." *Id.*

[108] Turner v. Wilson, 620 So. 2d 545, 554-55 (Miss. 1993) (McRae, J., dissent-

Early on there was much debate regarding the legal nature of the director's and officer's duty of care and the action charging breach. Did the action sound in tort, or was it a suit in equity? Today such a debate appears a bit silly, but in days of old, great practical consequences were thought to turn on the answer to the question: was the action within the subject matter jurisdiction of the circuit or chancery court and what statute of limitations applied?[109] And so we find *Boyd v. Applewhite* quoting the Supreme Court of the United States to the point that "the violation is in the nature of a tort,"[110] and adding that the duty of care "is imposed both by the common law and by statute. . . . It is based upon negligence."[111]

Today, the duty of care persists as a function of statute[112] *and* common law,[113] but surely we see by now that any inqui-

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ing) (arguing that corporate directors should be held liable for failure to take action when that omission stems from failure to exercise duties in compliance with statute). "A corporate director cannot, in the course of exercising the duties of his office, stand idly by or bury his head in the sand." *Turner*, 620 So. 2d at 555 (McRae, J., dissenting).

[109] *See Ventress*, 71 So. at 639 (discussing whether breach of duty of care claim belongs in circuit or chancery court).

[110] *Boyd*, 84 So. at 23-24 (quoting Corsicana Nat'l Bank v. Johnson, 251 U.S. 68, 70 (1919)). The *Boyd* court held since the suit was based on negligence, the three-year statute of limitations as to statutory claims did not apply. *Boyd*, 84 So. at 24.

[111] *Id.* For further sources of the tort/negligence view of the duty of care, see Alan R. Palmiter, *Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence*, 67 TEX. L. REV. 1351, 1360 n.19 (1989). In 1994 the legislature enacted an odd statute addressing the duty of care of bank directors. S.B. 2389 Reg. Sess. (Miss. 1994), *codified at* MISS. CODE ANN. § 81-5-105, of which we will have something to say below. In its wording the statute presents standards of conduct and says the director or officer "shall discharge his duties" as such in accordance with the standards. The wording then turns passive and defensism. A director or officer "is not liable . . . if he performed the duties of his office in compliance with . . . [the statutory standards]. MISS. CODE ANN. § 79-4-8.30(e), 8.42(d) (1996). It takes a judicial gloss to add the affirmation liability creating dimension to the duties. *See infra* note 196 and accompanying text.

[112] MISS. CODE ANN. §§ 79-4-8.30(a)(2), 8.42(a)(2) (1996). In 1994 the legislature enacted an odd statute addressing the duty of care of bank directors, section 81-5-105 of the Mississippi Code, discussed *infra*. *Id.* § 81-5-105.

[113] Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84 (Miss. 1992). In a recent discussion of the director's duty of care, Justice McRae observed "[i]t appears that the legislature sought to follow the common law of corporations

ry into its "nature" is so much metaphysical nonsense. We focus on its content and application and defenses thereto, and its empirical and theoretical policy underpinnings, and we take it as a given the action lies within chancery court jurisdiction.[114]

It is true the duty of care in the law of corporate governance in this state has been articulated almost exclusively in banking cases.[115] We note this, as there has always been "a bit of lore born no doubt of thought of failed banks and helpless widows that we ought demand more of bank officers than one who runs a foundry or a pest control company."[116] No Mississippi decision, however, suggests the duty of care is any less for corporate directors and officers generally than that imposed upon bank directors and officers.[117] Rather, the decisions rely on the law of corporate governance generally for the existence and particulars of the bank directors' and officers' duty of care.[118] *Omnibank of Mantee* relied heavily on the *Principles*

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when, in 1988, it enacted the Mississippi Business Corporation Act, adopting in part the Revised Model Business Corporation Act, a codification of the common law." *Turner*, 620 So. 2d at 554 (McRae, J., dissenting).

[114] *But see* Gibson v. Manuel, 534 So. 2d 199, 200 (Miss. 1988) (action by pledgee of corporate stock against corporation's officer and pledgor/controlling stockholder to prevent "looting" corporation heard in circuit court without apparent objection).

[115] The most recent case has a bank's suit against the chief operating official at a branch bank. *Omnibank of Mantee*, 607 So. 2d at 84-87; *see also Boyd*, 84 So. at 22-24 (suit against directors and officers of a failed bank); Ventress v. Wallace, 71 So. 2d 636, 641 (Miss. 1916) (suit against directors/officers of a failed bank); Ellis v. H.P. Gates Mercantile Co., 60 So. 649, 650-51 (Miss. 1913) (suit against directors of a failed bank).

[116] *Omnibank of Mantee*, 607 So. 2d at 84. The court pointed out that the same duties of loyalty and fair dealing attach to other corporate officers as well. *Id.*

[117] The myth I would dispatch was given an unfortunate touch of currency by Holmes the Lesser. *See* Holmes, *supra* note 19, pt. 1, at 190 n.105. Contrast S.B. 2389, Reg. Sess., 1994, *viz.*, providing that the officers and directors of banks and bank holding companies may not be held unless they "acted in a grossly negligent manner," adding that this bizarre "clarif[ication of] the . . . standard of care" for bank officers and directors "shall not affect the application of common law or any other statute relating to the duties of officers and directors of other corporate entities." 1994 Miss. Laws 645, *codified at* MISS. CODE ANN. § 81-5-105(6) (1996). *See generally* BLOCK ET AL., *supra* note 14, at 94-95.

[118] *See, e.g.*, *Boyd*, 84 So. at 22; *Ventress*, 71 So. at 638-39; *Ellis*, 60 So. at

of Corporate Governance.[119] In an Introductory Note to Part IV on the Duty of Care, *Principles* correctly and sensibly advises "[N]o basic distinction is drawn between banks (or other financial institutions) and industrial corporations with respect to duty of care provisions. . . . [T]oday differentiations based solely on the distinction between a 'financial institution' and an 'industrial corporation' are unjustified and anachronistic."[120]

VI. THE BUSINESS JUDGMENT RULE

A. *The Idea and Its Justification*

One thing corporate directors and officers do is make business judgments. The law has been especially solicitous of directors and officers sued on account of such judgments, which in hindsight one may wish undone. Over the years, a shield against such suits has arisen from the cases in the field, tailored to given circumstances and perceptions but invariably labeled the "business judgment rule."[121] The principal difference between the RMBCAAEIMAA and the *Principles of Corporate Governance* at this point is that the latter articulates the business judgment rule,[122] the director's and officer's principal

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650. The court in *Boyd*, *Ventress*, and *Ellis*, quoted extensively from *Thompson, The Law of Private Corporations*. *Boyd*, 84 So. at 22; *Ventress*, 71 So. at 638-39; *Ellis*, 60 So. at 650.

[119] *Omnibank of Mantee*, 607 So. 2d at 84-85. The court relied on *Principles* in its discussion of the burdens of production and persuasion. *Id.* at 85.

[120] PRINCIPLES, *supra* note 1, pt. IV, Introductory Note d, at 138. The Institute advocates uniform treatment for all types of corporations. *Id. But see* Resolution Trust Corp. v. Scott, 929 F. Supp. 1001, 1018 (S.D. Miss. 1996) (finding § 81-5-105 enacted to replace Omnibank's simple negligence standard of conduct for directors and officers with a gross negligence standard for bank directors and officers).

[121] BRODSKY & ADAMSKI, *supra* note 73, § 2:06; *see also* 3A WILLIAM M. FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1036-1041.70, 37-73 (perm. ed. rev. vol. 1994); 1 KNEPPER & BAILEY, *supra* note 73, §§ 2-1 to 2-15. For a look at the most comprehensive source on the business judgment rule, see BLOCK ET AL., *supra* note 14.

[122] A handful of courts have seen their respective states' versions of RMA § 8.30(a) as enacting the business judgment rule, Seafirst Corp. v. Jenkins, 644 F. Supp. 1152, 1159 (W.D. Wash. 1986); Gaillard v. Natomas Co., 208 Cal. App. 3d 1250, 1264 (Ct. App. 1989); Lindner Fund, Inc. v. Waldbaum, Inc., 624 N.E.2d

defense to a charge of breach of duty of care.[123] The basic idea is that courts do not sit to review bona fide business judgments of high level corporate decision makers.

The Second Circuit captured the idea and its justification a few years back:

> [C]ourts recognize that after-the-fact litigation is a most imperfect device to evaluate corporate business decisions. The circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later, since business imperatives often call for quick decisions, inevitably based on less than perfect information. The entrepreneur's function is to encounter risks and to confront uncertainty, and a reasoned decision at the time made may seem a wild hunch viewed years later against a background of perfect knowledge.[124]

The Delaware Court of Chancery has seen another justification for the rule. "[O]ne of the important reasons for the existence of the business judgment rule is the institutional incompetence of courts to pass upon the wisdom of business decisions."[125]

160, 161 (N.Y. 1993), although this view is demonstrably mistaken. This but begs the broader question. Whether the rule can or should be stated in black letter form has been an issue of great controversy (a phenomenon, in this writer's opinion, worthy of study by psychologists and others learned in behavioral sciences as much as by legal scholars). The draftsmen of the Revised Model Act deliberately withdrew their initial tentative effort. *See* BLOCK ET AL., *supra* note 14, at 43-45; Holmes, *supra* note 19, pt. 1, at 196-97; Official comment to RMA's section 8.30. In addition to the *Principles*' black letter and what the Revised Model Act's draftsmen see as recognition of the "continuing judicial development" of the rule, Delaware offers a dubious though influential form of the rule as a rebuttable presumption that corporate directors do their duty. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); and discussion in BLOCK ET AL., *supra* note 14, at 11-15.

[123] PRINCIPLES, *supra* note 1, § 4.01. The business judgment rule is available in some duty of loyalty/fair dealing cases as well. *See id.* § 5.03(a)(2) (compensation of directors and senior executives), § 5.05(a)(3)(B) (corporate opportunities), and § 5.06(a)(2) (competition with corporation). *See, e.g.*, Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1161 (Del. 1995) (applying business judgment rule in context of loyalty/fair dealing issue).

[124] Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982). For a survey of like expressions of the rationale supporting the business judgment rule, see BLOCK ET AL., *supra* note 14, at 5-11.

[125] Freedman v. Restaurant Assocs. Indus., [1987-1988 Transfer Binder] Fed.

Once as preeminent as Caesar's division of all Gaul into three parts was the legislative proclamation, "The business and affairs of a corporation shall be managed by a board of directors."[126] Courts have been charged to take seriously this legislative direction that directors and not judges are to manage the company's affairs.[127] Again, the Delaware Court of Chancery:

> Because businessmen and women are correctly perceived as possessing skills, information and judgment not possessed by reviewing courts and because there is great social utility in encouraging the allocation of assets and the evaluation and assumption of economic risk by those with such skill and information, courts have long been reluctant to second-guess such decisions when they appear to have been made in good faith.[128]

My favorite case under the business judgment rule, *Shlensky v. Wrigley*,[129] has acquired a certain aura of quaintness, but it still affords an instructive thought experiment. We have not forgotten that the Chicago Cubs for decades eschewed night baseball, long after all others had capitulated in pursuit of greater profits. Philip K. Wrigley did not want night baseball, and he owned or controlled eighty percent of the outstanding shares. Minority shareholders sued, charging that the directors breached the usual plethora of duties. The directors

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Sec. L. Rep. (CCH) ¶ 93,502, at 97,220 (Del. Ch. Oct. 16, 1987). It is well to recall that a word or two from the Delaware Court of Chancery in corporate governance matters is commonly thought more valuable than ten or twelve from any other jurisdiction. BLOCK ET AL., *supra* note 14, at 2.

[126] MISS. CODE ANN. § 53-09-71 (1990). Today's language is a little less emphatic: "managed by or under the authority" and "under the direction of." *Id.* § 79-4-8.01(b); *see* PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b. The ALI has stripped from the command its remaining rhetorical qualities. PRINCIPLES, *supra* note 1, § 3.01 & cmt. a; *see also* Moore Corp. v. Wallace Computer Servs., 907 F. Supp. 1545, 1548 (D. Del. 1995).

[127] BRODSKY & ADAMSKI, *supra* note 73, § 2:06.

[128] Solash v. Telex Corp., [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,608, at 97,727 (Del. Ch. Jan. 19, 1988); *see also* Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1262 (1994) (discussing policy of judicial non-interference with judgment of businessmen promoted by business judgment rule).

[129] 237 N.E.2d 776 (Ill. App. Ct. 1968).

defended on the business judgment rule. Fleshed out, the defense put forward values ranging from its view of the aesthetics of the game to protection of the neighborhood around Wrigley Field. The court dismissed. A generation later the minority shareholders won, albeit not in the courtroom.

Wherever baseball fits in one's perception of the values of Americana,[130] there seems no escape from accepting that a business judgment in 1968 that all home baseball games be played in the daytime was worthy of an ostrich. Try as one might, this decision by management could not be defended as one reasonably likely to maximize corporate profits or shareholder gain. Yet there can be no doubt that court was correct.[131] Intuitively, this is the sort of decision that needs to be made in the board room and not in the court room. Not that such a business decision should be free from scrutiny but that it should better be left to the processes of corporate democracy, the marketplace, and the right of unhappy investors to sell their shares. There are limits to the competence of courts that we ignore at our peril. Review of a business judgment to forego the profits from night baseball was and is beyond that competence. We would not hesitate to allow business judgments to pursue legally mandated policies that do not maximize corporate profits, and a number of these may readily be called to mind, ranging from payment of more than statutorily prescribed minimum wages to going above and beyond minimum environmental protection standards. Besides, there was no danger of a Chicago Cubs shareholder not knowing of management's preference for day baseball. Given corporate disclosure and reporting requirements, shareholders enjoy remedies adequate that they may fend for themselves without judicial review of management decisions perceived to pursue some policy other than pure profit.

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[130] *See* Flood v. Kuhn, 407 U.S. 258, 285 (1972) (holding baseball exempt from antitrust laws). The court embarked on a lengthy discussion of the history and worth of baseball in America. *Flood*, 407 U.S. at 260-64.

[131] *Shlensky*, 237 N.E.2d at 777. The reasoning in the *Shlensky* opinion leaves much to be desired. For example, the court rejects plaintiff's plea because "we are not satisfied that the motives . . . [of Wrigley and the other directors] are contrary to the best interests of the corporation . . . ." *Id.* at 780. This is an odd expression in an appeal from the granting of a motion to dismiss for failure to state a claim. More substantively, that it is not the test. I defend the result in *Shlensky*, not the court's publicly presented thought process en route.

The business judgment rule has been variously characterized, *viz.*, "a rule of judicial abstention," "a rebuttable presumption that corporate decisions are honest, informed and rationally undertaken,"[132] "[t]he booming theme in business judgment rule analysis is deference to management."[133] Prof. Eisenberg sees it as a "standard of review."[134] However characterized, the rule shields management decisions from judicial second guessing. It protects minimally careful management from liability itself.[135] Holmes the Lesser has summarized the "traditional" explanations for the rule as including:

> the recognition by courts of their inherent limitations in business matters and their concomitant reluctance to substitute their judgment for that of directors; the realization that directors are fallible and that persons of ability would be reluctant to serve as directors if the law imposed an unreasonably demanding degree of foresight; and the fact that many business decisions involve an inherent element of risk-taking.[136]

Balotti and Hanks have further justified the rule, reporting that the most "persuasive reasons for the rule are its role in encouraging qualified men and women to serve as directors and motivating them to be willing to take entrepreneurial risks."[137]

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[132] For a critical commentary on the "presumption" form of the business judgment rule, see R. Franklin Balotti & James L. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1339 (1993).

[133] Palmiter, *supra* note 111, at 1361-62. Some courts and scholars advocate that the deference to corporate decisions should be absolute. *Id.* at 1362.

[134] Eisenberg, *supra* note 74, at 437. "A *standard of review* states the test a court should apply when it reviews an actor's conduct to determine whether to impose liability or grant injunctive relief." *Id.*; *see also* BLOCK ET AL., *supra* note 14, at 3-4 (opining that business judgment rule is "tool of judicial review").

[135] 3A FLETCHER ET AL., *supra* note 121, § 1036. The business judgment rule evidences the court's reluctance to second-guess corporate decisions. *Id.*

[136] Holmes, *supra* note 19, pt. 1, at 191-92. Compare the rule of qualified public official immunity and its policy underpinnings. Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (holding police officer immune from warrantless search because his actions were reasonable). Mississippi applied qualified immunity standards to prison officials in *McFadden v. State*. McFadden v. State, 542 So. 2d 871, 877-83 (Miss. 1989) (holding prison officials immune from suit by prisoner who contracted tuberculosis).

B. The Form The Rule Takes And The Turf It Controls[138]

It is important to keep in mind that the business judgment rule by no means subsumes the duty of care. The rule hardly applies to all that a director or officer may do. It addresses a judgment made by a director or officer, not a failure to function altogether.[139] The rule speaks to "the quality of decisions, but not . . . the duty of monitoring, the duty of inquiry, or the duty to employ a reasonable decision-making process."[140]

There is disagreement what form the rule should take. For many years, Delaware has stubbornly seen the business judgment rule principally as an evidentiary presumption, albeit a rebuttable one.[141] The idea is that a director or officer sued over a business judgment is rebuttably presumed to have acted in good faith and with ordinary care.[142] The ALI *Principles* reject this view and set forth the rule as one of substantive law. If the rule's requisites are found, the director or officer is exonerated.

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[137] Balotti & Hanks, *supra* note 132, at 1342. The rule encourages entrepreneurial risk-taking which is important to American competitiveness in the world economy. *Id.*

[138] Some see the rule having limited effect in small, closely held corporations. *See* Muellenberg v. Bikon Corp., 669 A.2d 1382, 1386 (N.J. 1996) (citing F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 BUS. LAW. 873, 884 (1978)). I disagree, but note the point because of the prevalence of non-public corporations in Mississippi.

[139] *See, e.g.*, Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993) (refusing to apply business judgment rule when directors made no conscious decision). Delaware held the business judgment rule inapplicable until after a corporate decision has been made. Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) (refusing to apply business judgment rule where directors abdicated their functions).

[140] Eisenberg, *supra* note 74, at 447. Directors' failure to act falls under the duty of care. *Id.*

[141] *See*, most recently, Kahn v. Roberts, 679 A.2d 460, 466 (Del. 1996) (noting that business judgment rule raises "presumption of propriety" for actions taken "in good faith" which plaintiff must overcome); Grimes v. Donald, 673 A.2d 1207, 1219 (Del. 1996) (observing that judgments generally receive protection of business judgment rule). For a Delaware based survey of the presumption form of the rule, see BLOCK ET AL., *supra* note 14, at 11-19. *See also* Long v. Lampton, 922 S.W.2d 692, 698-99 (Ark. 1996) (defining business judgment rule as legal presumption upon which defendants may rely if they establish by a preponderance of the evidence that there was legitimate business purpose motivating their actions and such actions were taken in good faith).

The *Principles* view is correct. Presumptions serve a function where experienced has taught evidence is often lacking. If it had been our experience that the parties to suits attacking a business judgment by a director or officer had frequently found an evidentiary void on the central issues, a policy driven evidentiary presumption might well be appropriate. But there will almost always be witnesses to be called and evidence of who did what and when, albeit evidence often beyond the practicable abilities of judges and juries to assess with accuracy. In such instances, the presumption form of the rule is fundamentally deficient. For one thing, it is not needed. More significantly, it fails to tell our courts what they should do if the plaintiff's proof overcomes the presumption. Presumably, where this occurs, the presumption evaporates, in which case the court would be left without a substantive rule to apply. Delaware relegates the court to a nebulous "entire fairness" standard,[143] which in practical effect obliterates the unobliterable distinction between the duty of care and the duty of loyalty. The *Principles* recognizes this and fills the void with an affirmative declaration of a three pronged rule of substantive law set forth below.

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[142] *See, e.g.*, Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985). The directors must first show their actions were reasonable to be entitled to the presumption in takeover situations where a defense mechanism is invoked. *Moran*, 500 A.2d at 1356.

[143] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1162 (Del. 1995). The court notes that "dual fairness" is composed of "fair dealing and fair price." *Cinerama, Inc.*, 663 A.2d at 1162 (quoting Weinberger v. UPO, Inc., 457 A.2d 701, 711 (Del. 1995)). *See, e.g.*, Williams v. Geier, 671 A.2d 1368, 1378 n.20 (Del. 1996) (explaining that rebuttal of business judgment rule "implicates fair price and fair dealing").

C. The Business Judgment Rule In Mississippi

The rule received its first note in Mississippi jurisprudence in a highly problematic holding two generations ago.[144] *Knox Glass Bottle Co.* refused to question certain truck leases director/president Roy Underwood had his corporation enter with his brother, two nephews, and one of their business associates because Roy's actions "were based upon a good faith business-judgment by him as president. . . ," this notwithstanding that the leases were objectively unfair to the lessee corporation and quite profitable to the lessors.[145] Judge Keady added a rather vague dictum in *Home Telephone Co. v. Darley*[146] to the effect that "[a]lthough an officer is surely not liable for honest errors or mistakes of judgment when acting in good faith, this does not excuse mistakes where the loss is the result of failure to exercise ordinary care, skill and diligence."[147] Judge Keady cited no Mississippi authority,[148] although his jurisdiction

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[144] Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799, 817 (Miss. 1956). On a dozen fronts, *Knox Glass Bottle Co.* has been the bane of corporate counsel's existence for decades. Hodge & Perry, *supra* note 18, at 386. The good news is every single feature of *Knox Glass Bottle Co.* has been overruled, supplanted, clarified or subsumed by subsequent statute and case law. The bad news is that there are lawyers and judges out there who do not know this and may be inordinately hard to convince (assuming that as important questions arise in future litigation, we should be so fortunate that at least one party may be represented by counsel from among the cognoscente!).

[145] *Knox Glass Bottle Co.*, 89 So. 2d at 817. The court reasoned that the stockholders and directors of the company had constructive notice of the leases based upon Roy Underwood's knowledge of the leases since the stockholder and directors "had delegated the executive powers" to Roy Underwood. *Id.*

[146] 355 F. Supp. 992, 994 (N.D. Miss. 1973). *Home Telephone Co.* involved a suit by a corporation against its former officers for a purposeful breach of a merger agreement to the detriment of the corporation and the benefit of the individual officers. *Home Tel. Co.*, 355 F. Supp. at 994-96.

[147] *Id.* at 1000. The court ruled that Darley did not err honestly or act in good faith, but instead acted with full knowledge of the detrimental effect of his actions upon the company. *Id.*

[148] *Id.* In a footnote to his article, Holmes the Lesser observed:

> [A] number of Mississippi cases, while not explicitly premised on the business judgment rule, emphasize the tradition of judicial deference to the concept of majority rule in corporations. *See, e.g.*, Crocker v. Farmers & Merchants Bank, 293 So. 2d 438, 442 (Miss. 1974) (court should not enter area of corporate management except in cases where judicial action

rested on diversity of citizenship between the parties.[149] Instead, he relied on Fletcher's *Encyclopedia of Corporation Law*[150] which, indeed, had been the principal treatise relied upon by the Supreme Court in the *Knox Glass Bottle Co.* case.[151]

Notwithstanding, *Omnibank of Mantee*, as the first Mississippi case to articulate and apply the business judgment rule, referred to it as "a well-settled common law defense known as the business judgment rule."[152] Four years later Chief Judge William H. Barbour issued an identical expression of confidence that the business judgment rule had well satisfied the criteria for legal validity in Mississippi and applied the rule as an alternative ground for exonerating the president of a federally chartered savings and loan association.[153] It is worth re-

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> is essential to justice); Hudson v. Belzoni Equip. Co., 211 Miss. 178, 188, 51 So. 2d 223, 226 (1951) (courts are not to control corporations except in cases where such control is essential to justice).

Holmes, *supra* note 19, pt. 1, at 189 n.101.

[149] *Home Tel. Co.*, 355 F. Supp. at 994.

[150] *Id.* at 1000. The court noted that the common law governs tort liability for managing or controlling officers of a corporation who unreasonably or in bad faith allow the corporation to breach a contract. *Id.*

[151] *Knox Glass Bottle Co.*, 89 So. 2d at 814. In *Knox Glass Bottle Co.*, the court referred to Fletcher's *Cyclopedia of Corporation Law* a total of eighteen times as support for its opinion. *Id.* at 814-15, 816, 818, 819-20, 821, 824-25, 829.

[152] Resolution Trust Corp. v. Scott, 929 F. Supp. 1001, 1018 (S.D. Miss. 1996) (citing Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 85 (Miss. 1992)). *Percy v. Millaudon* is of sufficient vintage and geographical proximity to lend support to *Omnibank of Mantee*'s "well settled" claim. Percy v. Millaudon, 8 Mart. (n.s.) 68, 77-78 (La. 1829); *see also* Godbold v. Branch Bank, 11 Ala. 191, 199 (1847) (supporting business judgment rule in *Omnibank of Mantee*). The business judgment rule has been traced as far back as 1742. Charitable Corp. v. Sutton, 2 Atk. 400, 404 (1742).

[153] In *Resolution Trust Corp. v. Scott*, 929 F. Supp. 1001 (S.D. Miss. 1996), the court stated: "In fact, even analyzing Scott's actions under the *Omnibank [of Mantee]* standard, the Court finds that Scott's actions are protected by the business judgment rule as set forth in that case." *Resolution Trust Corp.*, 929 F. Supp. at 1019. Later the court applied that standard and held:

> Scott was an officer and director of Unifirst and in that capacity attempted to make business decisions which were in the best interest of Unifirst. He was well informed, was not interested in any of the subject matter of the Westchase/Westview transactions and he rationally believed that the judgments he made were in the best interests of Unifirst.

membering that the statutes at this point in time merely provided that a director or officer was not liable for any action or omission in his capacity "if he performed the duties of his office in compliance with [the duty of care]."[154]

D. Good Faith and Disinterestedness

The *Principles of Corporate Governance* go further and affirmatively state the business judgment rule as it was accepted in *Omnibank of Mantee.*[155] First, "[a] director or officer who makes a business judgment in good faith fulfills the duty . . . [of care] if the director or officer: (1) is not interested . . . in the subject of the business judgment."[156] Just what context "good faith" should be given beyond the components of the rule, we are not sure. Perhaps we confuse the familiar with the necessary when we say that the director or officer must have acted in good faith. In any event, we trust it is settled and beyond controversy that "good faith and disinterested decision making are," in the words of *Principles* commentary, "prerequisites to entry into the business judgment rule's safe harbor."[157] In other words, the business judgment rule defense has no force or effect where the defendant director or officer has a conflict of interest.[158]

Id. at 1024 (citing *Omnibank of Mantee*, 607 So. 2d at 84).

[154] *See* MISS. CODE ANN. § 79-4-8.30(e) (1996). A director of a corporation is held to a standard of good faith and reasonableness. *Id.; see id.* § 79-4-8.42(d). Some courts have seen these RMA provisions as codifying the business judgment rule. *See* Seafirst Corp. v. Jenkins, 644 F. Supp. 1152, 1159 (W.D. Wash. 1986) (determining business judgment rule has been codified); Gaillard v. Natomas Co., 208 Cal. App. 3d 1250, 1264 (Ct. App. 1989) (stating California has codified business judgment rule). The defensive language of sections 8.30(e) and 8.42(d) suggests as much. *Compare* MISS. CODE ANN. § 81-5-105 (1996), *with Resolution Trust Corp.*, 929 F. Supp. at 1016-17 (construing and applying section 81-5-105 to banks).

[155] *Resolution Trust Corp. v. Scott* accepts verbatim the *Omnibank of Mantee* approved expression of the business judgment rule in Mississippi. *Resolution Trust Corp.*, 929 F. Supp. at 1018.

[156] MISS. CODE ANN. § 79-4-8.42 (1996). Likewise, an officer of a corporation may be exempt from liability only if he acts reasonably and in good faith. *Id.*

[157] PRINCIPLES, *supra* note 1, § 4.01(c) cmt. d, at 176.

[158] *Id.* "The business judgment rule presupposes that the directors have no

E. The Information Requirement

The rule accepted in *Omnibank of Mantee* goes on to require that the director or officer "[be] informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances."[159] An informed decision attended by reasonable diligence in inquiry is a prerequisite to a director's or officer's right to claim the protections of the business judgment rule.[160] It is well settled that directors are required to take advantage "of all material information reasonably available to them" in making corporate governance decisions committed to their discretionary authority.[161]

Principles commentary draws an important distinction here.

> The informed decision prerequisite . . . focuses on the preparedness of a director or officer in making a business decision as opposed to the quality of the decision itself.
> Fundamental to an understanding of the standard . . . is the recognition that the extent of the information required is that which the director or officer "reasonably believes to be appropriate under the circumstance."[162]

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conflict of interest." Lewis v. S.L. & E., Inc., 629 F.2d 764, 769 (2d Cir. 1980). Directors may be held liable only for "self-dealing or fraud, or . . . bad faith." Treadway Cos. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980).

[159] *Omnibank of Mantee*, 607 So. 2d at 85 (quoting PRINCIPLES, *supra* note 1, § 4.01(c)(2)); *see also* BLOCK ET AL., *supra* note 14, at 22-32 (discussing requirement of due care in making reasonably informed business decision as important element of business judgment rule); 5 FLETCHER ET AL., *supra* note 121, § 2104(2). Specifically, officers of a corporation may be liable to the stockholders "where they exercise the corporate powers for their private or personal advantage or gain." 5 FLETCHER ET AL., *supra* note 121, § 2104(2).

[160] *Omnibank of Mantee*, 607 So. 2d at 85. Where the officer lacked the requisite information to make a valid business decision in *Omnibank of Mantee*, the court ruled that the officer had a duty "to ask." *Id.*

[161] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). "Under the business judgment rule there is no protection for directors who have made an unintelligent or unadvised judgment." Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (quoting Mitchell v. Highland-Western Glass, 167 A. 831, 833 (Del. 1933)).

[162] PRINCIPLES, *supra* note 1, § 4.01(c) cmt. e, at 177-78. Factors to be considered in this determination include:

Principles commentary further articulates, as elsewhere within section IV, that a corporate officer is held to both an objective and subjective standard of care in the obtaining of information, and that "the term 'reasonably believes' has both an objective and a subjective content."[163] As we have seen in Part III above, as a practical matter, the objective content subsumes and dominates the subjective.

F. The Rational Basis Test

1. The Test Stated And Applied

Finally, and most importantly, the business judgment rule, as adopted in *Omnibank of Mantee*, provides that the director or officer defendant is protected only if he "rationally believes that the business judgment is in the best interests of the corporation."[164]

Factually, *Omnibank of Mantee* concerned a bank's action against a former officer for breach of the duty of care in making bad loans upon which the bank suffered a substantial loss.[165] No one questioned that the officer had acted in good faith and in a manner that he believed to be in the best interest of the bank.[166] With regard to the claim that he breached his duty of

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> (i) the importance of the business judgment to be made; (ii) the time available for obtaining information; (iii) the costs related to obtaining information; (iv) the director's confidence in those who explored a matter and those making presentations; and (v) the state of the corporation's business at the time and the nature of competing demands for the board's attention.

Id. at 178.

[163] *Id.* The officer's actions should be interpreted "realistically" and from the officer's point of view at the time of the officer's decision. *Id.*

[164] *Omnibank of Mantee*, 607 So. 2d at 85 (quoting PRINCIPLES, *supra* note 1, § 4.01(c)(3)). An officer must subjectively believe his actions are in the corporation's best interest and the officer's belief must be objectively rational. PRINCIPLES, *supra* note 1, § 4.01(c), cmt. f.

[165] *Omnibank of Mantee*, 607 So. 2d at 82. The bank sought damages from the former officer for the losses resulting from his imprudent loans, which the chancery court granted. *Id.*

[166] *Id.* at 84. The court merely articulated the good faith requirement, while

care, the question was whether there was an objectively reasonable basis for the officer's belief that the loans were prudent and whether he acted with the care of an ordinarily prudent person (read "ordinarily prudent corporate/bank loan officer") in a like position and under similar circumstances.[167] On hotly disputed proofs, the trial court had found for the bank and against the officer, rejecting his defense under the business judgment rule.[168]

On appeal, the supreme court was clearly worried about the effect of this ruling and remarked:

> Most assuredly, the duty of care holds no truck with Monday morning quarterbacking, and the business judgment rule stands to prevent this. A loan officer is no guarantor of the success of each credit extension. By no means should anything said here be taken to suggest he has personal exposure every time a loan proves uncollectible.[169]

The court in the end affirmed, holding there was substantial evidence supporting the implied finding of objective unreasonableness in the officer's "belief regarding the extent to which he should have informed himself."[170] More importantly, the court found that legally adequate evidence supported the finding that "there was no rational basis for a belief that his handling of each of these matters was in USB's best interest."[171]

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recognizing the broad discretion inherent in the officer's duties within the corporation. *Id.*

[167] *Id.* In all actuality, the officer's requisite standard of care is that of an ordinarily prudent corporate, or bank, loan officer. *Id.*

[168] *Id.* at 85. The trial court found that the officer was negligent in extending credit to parties "which he knew or should have known . . . were insolvent." *Id.* at 86.

[169] *Omnibank of Mantee*, 607 So. 2d at 88. The officers actions are judged objectively from his subjective point of view at the time that he made the questionable loans. *Id.*

[170] *Id.* The Supreme Court of Mississippi relied upon the chancery court's findings based upon implications. *Id.*

[171] *Id.* There was evidence the Bank's debtors were hopelessly insolvent when the officer extended new credits to them. *Id.* at 86. In reading and understanding *Omnibank of Mantee*'s application of the business judgment rule, one must keep well in mind the court's limited prerogatives in reviewing facts found by a trial

2. *The Test Considered, Justified and Illustrated*

The *Omnibank of Mantee* court tracked the language of the ALI articulation of the business judgment rule which provides an officer insulation from liability, except where he does not rationally believe that the business judgment is in the best interest of the corporation.[172] The RMBCAAEIMAA states the duty of care in terms of what the director or officer "reasonably believes."[173] Sound public policy dictates that directors and officers making business judgments be given greater protection than a "reasonableness" test would afford. This is why the *Principles/Omnibank of Mantee* statement of the business judgment rule uses the phrase "rationally believes." That phrase permits the director or officer making business judgments significantly more room to be wrong than does the term "reasonable" and protects a director or officer from liability for business judgments that might arguably fall outside the term "reasonable" but are not so removed from the realm of rationality when made that damages should be assessed.

To be sure, the word "rational" is seen by many as synonymous with and interchangeable with "reasonable," but the ALI made clear that

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court. *Id.* at 82. *See, e.g.,* Cotton v. McConnell, 435 So. 2d 638, 685 (Miss. 1983) (explaining scope of review); Culbreath v. Johnson, 427 So. 2d 705, 707 (Miss. 1983) (stating appellate court's duty of deference to trial court's ruling).

[172] It is not at all clear how a court might apply the rule without first stating it. I have always thought law declaration a rather necessary step in the process of adjudication. *See* Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1029 (Miss. 1985) (stating requirement of law declaration in adjudication). I refer to the RMA draftsmen's heretofore stubborn refusal to codify the business judgment rule putting forth a less than helpful ruse that the elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts. RMA Official Comment to Section 8.30. *Compare supra* note 122. Of course there are, as are all rules of law to one degree or another, but this hardly justifies refusal to resort to what wisdom we have to give the rule the best reading we can. For the moment, *Knox Glass Bottle Co.* nor *Home Telephone Co.* hardly offered viable alternative formulations for the *Omnibank* court to consider.

[173] MISS. CODE ANN. § 79-4-8.30 (1996). This subjective reasonableness standard is also articulated in PRINCIPLES, *supra* note 1, § 4.01(a).

> a sharp distinction is being drawn between the words here. The phrase "rationally believes" is intended to permit a significantly wider range of discretion than the term "reasonable," and to give a director or officer a safe harbor from liability for business judgments that might arguably fall outside the term "reasonable" but are not so removed from the realm of reason when made that liability should be incurred. Stated another way, the judgment of a director or officer will pass muster under §4.01(c)(3) if the director or officer believes it to be in the best interests of the corporation and that belief is rational.[174]

The *Principles* Reporters offer a couple of illustrations which appear intended to give flesh to the "rationally believes" component of the business judgment rule.[175] In the first, they ask that we assume

> A Corporation requires large quantities of ball bearings in its manufacturing process. It can buy ball bearings of precisely equal quality from Supplier B or Supplier C, but Supplier C will charge 30 percent more per unit than Supplier B. Supplier C is owned by an alumnus of the same university which was attended by most of the directors of A Corporation. Solely because they wish to favor a fellow alumnus, and with no expectation of reciprocal business or other collateral benefits to A Corporation, the board of A Corporation approves a three-year exclusive supply contract with Supplier C.[176]

Absent other extenuating circumstances, such a decision offends the directors' duty of care. The Reporters go on to add that the directors' resort to the business judgment rule defense will fail as well.[177]

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[174] PRINCIPLES, *supra* note 1, § 4.01 cmt. d, at 142. "Th[e] standard is intended to provide directors and officers with a wide ambit of discretion." *Id.* at 141-42.

[175] *Id.* § 4.01(c) cmt. f, illus. 1-6.

[176] *Id.* § 4.01(c) cmt. f, illus. 5. In this hypothetical, the protections of the business judgment rule would not be available to the directors of A. *Id.*

[177] *Id.* On the facts hypothesized, "the directors did not rationally believe that their decision was in the best interests of A Corporation. The protection afforded by the business judgment rule would not be available to the directors of A Corpo-

The result in this illustration seems clear enough. In the example, the directors made a conscious decision to commit corporate assets without regard to advancing the normal business purposes of the company and without a view toward enhancing corporate profit or shareholder gain or any public policy spin thereon. The *Principles* Reporters go on to offer a counter-example designed to illustrate and make clear that the business judgment rule shields minimally intelligent risk taking.[178] The circumstance hypothesized is this:

> P Corporation has engaged for a number of years in the manufacture and sale of a single patented device, but its patent has recently been declared invalid in a final court judgment. P Corporation's officers have concluded that the competition anticipated as a result of the judgment will shortly render manufacture and sale of the device unprofitable. P Corporation's research and development staff has developed a new product which appears to have consumer acceptance based on very limited market testing. However, the product will not be profitable unless it can be produced and sold promptly and in large quantities. Production in large quantities would require a very substantial capital expenditure and much of this investment would be lost if the new product fails.[179]

The law of corporate governance is not designed to encourage timidity in the face of such facts. While not an everyday occurrence, this example is one which in some form or another may be expected to occur from time to time in our competitive economy. The Reporters conclude correctly that

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ration." *Id.*

[178] *Id.* § 4.01(c) cmt. f, illus. 6. The courts allow broad leeway for corporate directors and officers with decision-making authority, and the courts will avoid second-guessing them as long as their decisions are an exercise of good faith judgment. *Id.* § 4.01(c) cmt. e. This practice encourages efficiency and business creativity. *Id.*

[179] PRINCIPLES, *supra* note 1, § 4.01(c) cmt. f, illus. 6.

> [b]ased on the information available to it, the board of directors of P Corporation may exercise its business judgment to authorize the necessary capital expenditure. The decision is proper under the "rationally believes" test even though there is a high degree of risk and uncertainty whether the new product will succeed . . . .[180]

If the new product fails and the directors are sued, the business judgment rule should be a sufficient defense.[181]

I am not satisfied that *Principles* has chosen the best form of expression for the business judgment rule, even if what is intended is apparent. One commentator has offered this explanation that may be helpful. The Reporters' decision to reject a subjective good-faith standard, without more, in subsection (c)(3), and to select the phrase, "rationally believes," together with the related explications in the comment, constitutes an acceptable alternative.[182] The Reporter's stated intention in choosing the "rational basis" standard was "to permit a significantly wider range of discretion than the term 'reasonable'" would allow.[183] Furthermore, the Reporter observed that "[m]any courts have used words like 'reckless disregard' or 'recklessness' to convey a similar sense of the wide latitude that directors or officers should be afforded."[184] Some less imaginative observers, however, have confided difficulty in conjuring up discrete fact situations that would produce a meaningful distance between the perimeters of "reasonable" and "rational." Nevertheless, the Reporter has furnished content for the "rational basis" phrase that provides the practical equivalent of the somewhat inelegant phrase often used during the course of the deliberations with the Consultants and Advisers—"off the wall."[185]

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[180] *Id.* However, if the circumstances upon which the officer's rationally based decision was premised somehow changes, the rational belief requirement may no longer be satisfied. *Id.* § 4.01(c) cmt. f. Hence, the test for rational belief must be applied to each individual decision that the officer makes instead of once to repetitive decisions. *Id.*

[181] *Id.* § 4.01(c) cmt. f, illus. 6. The Board's decision satisfies the rational belief test. *Id.*

[182] *Id.* § 4.01(c) cmt. f. As I am wont to note, Holmes the Greater reminds us when confronting any legal text, our proper concern is and should be what it means, not what the makers meant. OLIVER W. HOLMES, JR., *The Theory of Legal Interpretation*, *in* COLLECTED LEGAL PAPERS 203, 207 (1920).

[183] PRINCIPLES, *supra* note 1, § 4.01 cmt. d, at 142. A rational basis for belief is a broader standard than that of a reasonable basis for belief. *Id.*

[184] *Id.* § 4.01(c) cmt. f, at 180. A majority of courts agree with this approach. *Id.* In addition, § 4.01(c)(3) placates the public's need for a strong public policy. *Id.*

More recently, the *Principles*' Chief Reporter, Professor Melvin Aron Eisenberg, has written,

> [t]his rationality standard of review is and is intended to be very easy for a director or officer to satisfy, and, in particular, much easier to satisfy than a reasonability standard. Perhaps the most obvious type of a decision that lacks rationality is one that cannot be explained coherently. For example, in *Selheimer v. Manganese Corp. of America*[186] the managers poured the corporation's funds into a single plant even though they knew the plant could not be operated profitably because of a lack of railroad siding, a lack of proper storage areas, and other factors. The court imposed liability on the ground that the defendants' conduct "defies explanation; in fact, the defendants have failed to give any satisfactory explanation or advance any justification for [the] expenditures."[187]

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[185] Joseph Hinsey IV, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609, 617 (1985). The phrase "off the wall" enjoys a certain currency in the literature. Balotti & Hanks, *supra* note 132, at 1347; *see also* Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Rule*, 45 BUS. LAW. 2065, 2071 (1990) (referring to business judgment rule as "the 'off the wall' test"); Bayless Manning, *The Business Judgment Rule in Overview*, 45 OHIO ST. L.J. 615, 622 (1984) (explaining "off the wall" in terms of "wildly irresponsible actions").

[186] 224 A.2d 634, 639 (Pa. 1966).

[187] Melvin A. Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271, 1282 (1993) (discussing *Selheimer*, 224 A.2d at 634). This example is also stated in another work by Eisenberg. Eisenberg, *supra* note 74, at 443.

VII. THE DUTY OF CARE REVISITED

A. *The Duty of Care and the Business Judgment Rule*

All of this said, questions remain regarding the level of care our law expects and demands of corporate leaders, and whether that level matters. For one thing, Holmes the Lesser has reminded us that, pre-RMBCAAEIMAA, thoughtful persons disagreed widely on the point—should the standard be negligence or gross negligence?[188] Section 81-5-105 of the Mississippi Code purports to present a gross negligence standard for bank directors but has defined gross negligence as importing at once gross and simple negligence.[189] Banks aside, the more serious question today is, just what is meant by "the care an ordinarily prudent person in a like position would exercise under similar circumstances."[190]

There is controversy whether the law addresses process or substance. Delaware seems to hold that the duty of care in corporate decision-making relates solely to process.[191] Citing Delaware, Charles Hansen argues "there is no such thing as liability for a negligent substantive decision."[192] But is this so? Directors may jump through all the hoops and yet make horrible decisions. Arguably, these should be protected, absent bad faith or conflict of interest. But should not an objectively reasonable substantive decision enjoy equal protection, notwithstanding a failure of process? Principled symmetry with established duty of loyalty norms certainly suggests so. There a conflicting interest transaction may withstand judicial scrutiny so long as it was "at the time of commitment. . . fair to the corporation," and this notwithstanding a failure of process.[193] The law has no interest in deterring directors in their resort to insight, intuition and the venerable but humble hunch, all of which in the end may prove as brilliant as the most studied business judgment.[194] When you only have 48 hours to seize for the corporation an intuitively attractive opportunity, you don't have time to jump through too many procedural hoops.[195] If there was in fact a rational basis for a corporate decision, no sensible end is served by holding a director or officer because he didn't dig hard enough to learn of that basis.

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[188] Holmes, *supra* note 19, pt. 1, at 191 n.106, 196. There was also a question of "whether it is feasible to codify the duty of care at all." *Id.* at 196.

[189] MISS. CODE ANN. § 85-5-105 (1996).

[190] *Id.* §§ 79-4-8.30(a)(2) to 8.42(a)(2). The officer may be held to the generalist standard of a "reasonable prudent person" in some situations and to the standard of "an ordinary prudent person in such a position" in other circumstances. PRINCIPLES, *supra* note 1, § 4.01(a) cmt. c.

[191] Citron v. Fairchild Camera Instrument Corp., 568 A.2d 53, 66 (Del. 1989). Since 1985, "our due care examination has focussed on a board's decision-making process." *Citron*, 568 A.2d at 66 (citing Smith v. Van Gorkum, 488 A.2d 858, 874 (Del. 1985)). The court in *Smith v. Van Gorkum* examined each step in the board's decision-making process. *Smith*, 488 A.2d at 874.

[192] Charles Hansen, *The Duty of Care, the Business Judgment Rule and the American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355, 1357 (1993). Hansen explains that "a director can make a decision that would not have been made by the ordinarily prudent person and escape liability if appropriate process was followed." *Id.*

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[193] MISS. CODE ANN. § 79-4-8.60(b)(3) (1996). Failure to meet this standard could constitute a conflict of interest. *Id.*

[194] Consider the case of Frank Lloyd Wright's commission by Edgar Kaufman to design for the Kaufman family a weekend home near a waterfall in western Pennsylvania. After months of the master's procrastination the impatient client demanded progress. The story goes that Wright

> had visited Bear Run for the second time by the summer of 1935, and his apprentices knew that the house had not yet been designed. Still, the weeks went by. Cary Caraway said, "At tea he'd talk about things and not setting them down until the idea was clear in his mind. As I remember it, Mr. Kaufman came to Milwaukee for some other function and said, "I'd like to know how you are doing, Mr. Wright," and Wright replied calmly, "Your house is finished, and we knew nothing had happened." Then we heard that Kaufman was about to drive the 140 miles from Milwaukee to Spring Green. It could have been the morning of that day when word went out, "He's in the studio." Then the next report was, "He's sitting down!" It was one of the most famous moments in architecture and one of the best documented-it was witnessed by Blaine Drake, Edgar Tafel, Bob Mosher, John Lautner, Jack Howe and others as well as Caraway-tantamount to being at Mozart's elbow the day he dipped his quill pen into the ink and began to compose *The Magic Flute.* They were waiting to see how this champion juggler, who had kept so many balls up in the air, would retrieve this one. Wright calmly began work, and, Caraway continued, "took three sheets of tracing paper in different colors, one for the basement, another for the first floor and a third for the second floor and sketched it to a scale of one-eighth inch equals one foot. We were all standing around him. I'd say it took two hours." Section, elevation and details: they were pouring onto the paper, and pencils were being worn down and broken off as fast as they could be sharpened." Ax he worked, he kept up a running commentary: "The rock on which E.J. sits will be the hearth, coming right out of the floor, the fire burning just behind it. The warming kettle will fit into the wall here. . . . Steam will permeate the atmosphere. You'll hear the hiss. . .

On the other hand, if the business judgment rule is a true immunity rule, or perhaps a judicial abstention rule, and if its requisites are satisfied, it doesn't matter what level of care is required; the court will not intervene. For the moment, where the defendant director or officer is sued over a true business judgment, the ALI formulation of the business judgment rule, as accepted (if not necessarily as applied) in *Omnibank of Mantee*, subsumes so much of the RMBCAAEIMAA formulation of the duty of care as address discretionary business judgments and, as well, the ALI *Principles*' augmentation thereof. The *Principles* seem to confess the point, i.e., "The business judgment rule . . . is a judicial gloss on duty of care standards . . . ."[196] In this view, the duty of care is outcome determinative only in those left over cases where the defendant has altogether failed to function, or, at least, where he is being sued for some act not a business judgment. If experience can be trusted to foreshadow the future, Mississippi at least is less than likely to see litigation that questions—much less unties—these elusive knots.

> ." He had even decided upon the name of the house, it was a tour de force. . . . It was the genesis of one of the most beautiful houses in the world: Fallingwater.

MERYL SECREST, FRANK LLOYD WRIGHT: A BIOGRAPHY 419-20 (1993). The story is also told in BRENDAN GILL'S MANY MASKS: A LIFE OF FRANK LLOYD WRIGHT 344-46 (1987). I trust Mr. Hansen and the other process people would allow Wright's substantive results as an adequate defense for his indefensible process.

[195] For an account of the full fact situation, see Smith v. Van Gorkom, 488 A.2d 858, 964-70 (Del. 1985). For Delaware's latest take on all of this, see Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993); Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995).

[196] PRINCIPLES, *supra* note 1, § 4.01 cmt. d. The business judgment rule, in effect, shields directors and officers from many instances of liability. *Id.*

B. The RMBCAAEIMAA: the Duty Presently Proclaimed

Today the duties of corporate directors and officers are found first and foremost in the law's statutory species, the RMBCAAEIMAA.[197] The Act articulates the standard of care to which officers—within their discretionary authority—are held.[198] Formally at least, the statute separates the duties of directors and officers.[199] In substance they are quite similar. *Principles* commentary holds "[s]ound public policy points in the direction of holding officers to the same duty of care and business judgment standards as directors."[200] Generality of expression makes this possible.

The RMBCAAEIMAA proclaims:

> (a) An officer with discretionary authority shall discharge his duties under that authority:
> (1) In good faith;
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

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[197] MISS. CODE ANN. § 79-4-8.30(d) (1996). The statute states that a corporate director should consider the interests of the corporation and the interests of the shareholders. *Id.* In addition, the director may consider:

> (1) The interests of the corporation's employees, suppliers, creditors and customers;
> (2) The economy of the state and nation;
> (3) Community and social considerations;
> (4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

Id.

[198] *Id.* § 79-4-8.42. This standard represents the duty of care, not loyalty, and it is not at all apparent why the draftsmen and codifiers of the RMBCAAEIMAA could not have made the fact clear. *Id.*

[199] *Id.* § 79-4-8.42. The statute states many factors to be considered when assessing an officer's duty of care. *Id.* §§ 79-4-8.42, -8.30(a). The factors to be considered when evaluating a director's standard of care are also codified. *Id.* §§ 79-4-8.30(a), -8.42.

[200] PRINCIPLES, *supra* note 1, § 4.01 cmt. a. Case law and commentary also lean toward extending the same duty of care and requisite business judgment to both officers and directors. *Id.*

> (3) In a manner he reasonably believes to be in the best interests of the corporation.[201]

The Act then addresses the director in the discharge of his "duties as a director, including his duties as a member of a committee" and imposes verbatim the same three standards: good faith, ordinary care under similar circumstances, and reasonable belief regarding the best interests of the corporation.[202] In their wording, these standards import a certain and quite sensible flexibility.[203] Obviously, "full-time officers will generally be expected to be more familiar with the affairs of a corporation than outside directors."[204] In form of expression, the duty remains the same.

In language semantically similar and substantively identical to that of the statute, *Principles*, § 4.01 articulates the officer's and director's duty of care:

> (a) A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.[205]

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[201] MISS. CODE ANN. § 79-4-8.42(a) (1996).

[202] *Id.* § 79-4-8.42.

[203] *Id.* § 79-4-8.42. The statutory language is best understood in its historical context. "This standard is based on former section 35 of the 1969 Model Act, a number of state statutes and on judicial formulations of the duty of care." MBA Official Comment to § 8.30. It is hardly a model of clarity or substantive correctness. No perceptive draftsman writing on a clean slate would produce this formulation. Indeed, it is not clear just what the draftsmen intended, so that some would deny that it establishes a basis for director or officer liability. *See* Shinn v. Thrust IV, Inc., 786 P.2d 285, 290 n.1 (Wash. App. 1990) (stating that statutory language was not intended to be codification of business judgment rule). *But see* PRINCIPLES, *supra* note 1, § 4.01 Reporter's Notes 1-17, at 155-60 (outlining various measures enacted by statutes concerning duty of care). As we have just seen, the business judgment rule resolves the interpretative problem.

[204] PRINCIPLES, *supra* note 1, § 4.01 cmt. a, at 140-41. Likewise, officers who directly supervise certain aspects of the business "will be expected to be more familiar with business affairs under their direct supervision than officers who do not have such responsibility." *Id.* at 141.

[205] *Id.* § 4.01(a). The court quoted this statement of the duty of care in

Section 4.01(a) makes the duty expressly subject to the business judgment rule "where applicable," a point on which the statute is silent though most think it implicit. This general expression of the duty obtains for corporations of all complexities and sizes, closely held or publicly traded.[206] Phrases like

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Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84 (Miss. 1992). Of this, Charles Hansen of the ABA Corporate Governance Subcommittee has recently written:

> In this decision, the Mississippi Supreme Court was faced, among other things, with deciding whether the president of a branch bank had breached his duty of due care in extending credit. The court adopted as the law of Mississippi section 4.01(a) of the Project which articulates an "ordinarily prudent person" standard as the test of liability. The confusion inherent in the use of such a test is reflected in the *Omnibank of Mantee* decision, which can be read to impose liability for the substance of decisions which would not have been made by the "ordinarily prudent person." ("[A]n officer who 'very negligently' makes unreasonably risky loans may on his borrowers' default be held personally to make good the bank's loss."

Network, The Newsletter of the Committee on Business & Corporate Litigation, 2 A.B.A. SEC. BUS. L., Winter 1994, at 5. Mr. Hansen fails to note that the RMBCAAEIMAA commands the "ordinarily prudent person" standard.

Omnibank of Mantee's recitation of Principles § 4.01(a) which, as noted, is substantially the same as the statute, has drawn note as well by bank and thrift counsel:

> In neighboring Mississippi, also in the Fifth Circuit, the Mississippi Supreme Court handed down a decision in *Omnibank of Mantee and James R. Gray v. United Southern Bank*, a case involving the directors of a commercial bank. This case is read, depending upon the perspective of the reader, as standing for a spectrum of director standards of care.

F. Lee Leibolt, Jr., *The RTC: A Current Analysis Of Its Civil Court Efforts*, *in* DEFENDING BANK AND THRIFT DIRECTORS AND COUNSEL IN THE NINETIES 17 (PLI 1993).

Omnibank of Mantee, of course, did not involve a director. *Omnibank of Mantee*, 607 So. 2d at 78-79. James R. Gray was an officer, the president of a branch bank. *Id.* We have no idea what the authors mean about the opinion "standing for a spectrum of director standards of care," unless they refer to the interpretive problems inherent in all generally worded standards.

These criticisms in their language seem directed at the court's expression of the duty of care. That form of expression was and is fixed by statute, and the *Principles* exposition imports no change of substance or meaning. The court hardly seems subject to censure for accepting the statute. Obviously, whether the statutory standard has been correctly applied to the facts is fair game for the critics.

[206] PRINCIPLES, *supra* note 1, pt. IV, Introductory Note d. The wording of §

"in a like position" and "under similar circumstances"[207] draw their meaning and application in given cases in part from the nature of the particular corporation.

"[R]eliance is essential in many corporate contexts."[208] Directors and officers regularly receive from corporate underlings a great variety of reports, statements and other information about this or that aspect of the business of the company. Section 79-4-8.42(b) of the Mississippi Code adds important protections for officers relying on the work and information furnished by others:

> (b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or
>
> (2) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.[209]

Section 79-4-8.30(b) identifies the same sources and affords the director a like right but with a significant addition that the director may also rely on "[a] committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence."[210]

4.01 takes into account the differing affects these variations will have with regards to corporate directors and officers. *Id.*

[207] *Id.* § 4.01(a).

[208] *Id.* pt. IV, Introductory Note a, at 135. The reporters noted that "there are inherent dangers in judging a failure by directors or officers to act or foresee in the stark light of hindsight." *Id.*

[209] MISS. CODE ANN. § 79-4-8.42(b) (1996). *Principles* recognizes that corporate directors cannot always be at the corporate headquarters. PRINCIPLES, *supra* note 1, § 4.01 cmt. g.

[210] MISS. CODE ANN. § 79-4-8.30(b)(3) (1996). The statute further points out that "[a] director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by section (b) unwarranted." *Id.* § 79-4-8.30(c).

C. The Duty of Care Dissected

1. Good Faith

A word on the three components of the duty of care. The good faith standards of Sections 79-4-8.30(a)(1) and -8.42(a)(1) have been said to provide "a baseline duty."[211] Directors and officers participating in transactions with other shareholders are charged to act in "good faith" and "with prudence and all good fidelity."[212] In the context of a shareholder's derivative suit complaining that directors and officers had diverted corporate opportunities, the Supreme Court has held "[g]ood faith alone, even in the absence of harm to the corporation, will not suffice to absolve the fiduciaries of liability: it must be clear that the duty of fidelity and diligence, as well as the duty of continuing disclosure of material facts, has been fully discharged."[213] In a sense, good faith is an overreaching component of all duties of directors and officers. On the other hand, it seems subsumed by the totality of all other and more specific obligations of the directors and officers. It is difficult to imagine a failure to act in good faith that is not also an offense to some more concrete expression of duty, as, for example, when we are told "one aspect of the duty of good faith is that a director or officer may not knowingly cause the corporation to take an action that violates the law."[214] Also, a director should not be deemed to act in good faith if, among other things, he knowingly receives a material benefit to which he was not entitled.

The RMBCAAEIMAA provides an instance of what good faith is not. A director or officer "is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted."[215] "Knowledge" imports an objective standard. An director or officer will be charged with knowledge of that which a prudent and diligent director or officer should have known, given the circumstances.[216]

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[211] Eisenberg, *supra* note 74, at 449. Professor Eisenberg argues that the duty of good faith is "in fact . . . distinct from . . . [the] duty [of care]." *Id.*

[212] Fought v. Morris, 543 So. 2d 167, 172 (Miss. 1989). The Mississippi courts have recognized the duty as one requiring "ordinary prudence" and "all good fidelity." Gibson v. Manuel, 534 So. 2d 199, 203 (Miss. 1988).

[213] Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1335 (Miss. 1979).

[214] Eisenberg, *supra* note 74, at 449. This proposition stands regardless of the subjective belief that the corporation would profit from the action. *Id.*

2. *Ordinarily Prudent Person*

A second component of the duty requires the director or officer to exercise that level of "care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances."[217] The words "ordinarily prudent person" suggest "the image of the generalist who has the capacity to perform a given corporate assignment."[218] "In a like position" or "under similar circumstances," however, may import special knowledge or skills as with in-house counsel or auditors. Consistent with our rejection of the fiduciary model in duty of care cases, the word "prudent" should not and must not be read "to inhibit directors or officers from encouraging, or engaging in, rational risk taking, innovation, or other entrepreneurial activities in the interest of long-term profitability and shareholder gain."[219]

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[215] MISS. CODE ANN. § 79-4-8.30(c) (1996). This same example is stated with regard to a corporate officer. *Id.* § 79-4-8.42(c).

[216] Attorney U v. Mississippi Bar, 678 So. 2d 963, 971 (Miss. 1996) (citing GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 402 (1993)). The court notes that specialists or experts may be held to a higher standard of knowledge than are generalists. *Id.*

[217] PRINCIPLES, *supra* note 1, § 4.01(a). This comports with the commonly accepted standard of care in most states. *Id.* § 4.01 cmt. a, at 140.

[218] *Id.* § 4.01(a) cmt. c, at 148. *Principles* also offers a useful illustration:

> C, who is rich and charming, has been a director of Y Corporation for several years. C's only significant contribution to Y has been a willingness to entertain important customers. C has said: "I do not have the capacity to oversee Y's business," and has made no attempt to oversee it. Y Corporation has gone into bankruptcy because of mismanagement. C, as a result of the failure to oversee the conduct of Y's business, has committed a breach of the duty of care. The fact that C may not have the capacity of an "ordinarily prudent person" is no defense. C will be held to an objective standard.

Id. illus. 6, at 149.

[219] *Id.* § 4.01(a) cmt. c, at 148-49.

All of this is readily seen as importing an objective standard.[220] It is unexceptionable in content and form of expression. Implementation is another matter.[221] *Principles* repeatedly emphasizes that the duty of care, in neither its generality nor its familiarity of phrasing, "is not intended to minimize the special characteristics of service as a director or officer of a business corporation."[222] The problem is finding factfinders having a clue what an ordinarily prudent corporate director would reasonably be expected to do in a like position and under similar circumstances and doing this consistent with the right to trial by jury.[223]

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[220] *Principles* commentary notes that often times officers or directors have special training or expertise, e.g., "in engineering, accounting, or law" and in this finds a subjective aspect of the duty of care. *Id.* § 4.01(a) cmt. f. The finding is flawed, as the director or officer's special training and expertise form a part of his "position and 'circumstances,'" albeit a flexible one. *Id.*

[221] One commentator has described rather pointedly just how a court taking seriously this formulation of the duty might proceed:

> [T]he trier of fact [must] first . . . construct a factual background including the time and information constraints, the makeup of the board, and its role in corporate decision making (the "in like position" and "in similar circumstances" elements). Next, what the ordinarily prudent person, as measured against that factual background, would do with respect to the issue in question must be determined. Finally, the trier of fact must decide if the conduct or action of the directors in question was consistent with the reasonable man standard.

Daniel T. Murphy, *The New Virginia Stock Corporation Act: A Primer*, 20 U. RICH. L. REV. 67, 105 (1985). *Compare* Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (noting "after-the-fact" litigation not best method for evaluation of corporate strategies). More sobering is the thought that this state's courts may well lack the experience and sophistication to apply the test competently. *See, e.g.*, Turner v. Wilson, 620 So. 2d 545, 554 (Miss. 1993) (McRae, J., dissenting).

[222] PRINCIPLES, *supra* note 1, § 4.01 cmt. h, at 144. The comment notes that the duty of care will vary depending upon each situations particular facts. *Id.* A director or officer will be evaluated according to the standard of a person similarly situated. *Id.* § 4.01(a) cmt. e, at 152. Additionally, the reasonable care standards adhere to the position taken by a majority of jurisdictions. *Id.* cmt. h, at 153.

[223] U.S. CONST. amend. VII. The United States Supreme Court extended the right to a jury trial to stockholder derivative actions concerning issues in which the corporation would be entitled to a jury. Ross v. Bernhard, 396 U.S. 531, 532-33 (1970); *see also* MISS. CONST. art. III, § 31 (1890).

3. *Best Interests of the Corporation*

The third prong of the duty of care in that the director of officer act "in a manner that he or she reasonably believes to be in the best interests of the corporation."[224] This sounds a lot like a wordier version of the good faith standard.[225] It is often thought of as having both a subjective and an objective component.[226] In the words of Prof. Eisenberg, "The director or officer must subjectively believe that his conduct is in the best interests of the corporation, and that belief must be objectively reasonable."[227]

In practical reality, the standard is an objective or external one. Proof or disproof of a director or officer's belief is by definition a circumstanced external matter, for "[i]n the final analysis, all conclusions about someone else's state of mind must be derived from circumstantial evidence."[228] We cannot peer into a person's mind and cannot always take what he tells us at face value. We attribute to him that state of mind that would be held by a reasonable person, given all of the external facts and circumstances we can muster. And if there is in fact an objectively reasonable basis for thinking the act in the best interest of the corporation, on what ground ought we hold the defendant director solely because he did not appreciate fully that basis? So seen, the subjective element devolves into and is subsumed by the objective.

Each section of the duty of care concludes with a liability shield if the director or officer does his duty. A director or officer "is not liable for any action taken as a director [or officer], or any failure to take any action, if he performed the duties of his office in compliance with this section."[229] In the case of a director, "this section" refers to the entire Section 79-4-8.30,[230] while in the case of an officer "this section" refers to the entire Section 79-4-8.42.[231] Over and above these shields, there is the business judgment rule.

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[224] Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84 (Miss. 1992) (quoting PRINCIPLES, *supra* note 1, § 4.01(a)). The court previously noted that a loan officer's extreme negligence could make him liable for resulting loss. Boyd v. Applewhite, 84 So. 16, 26 (Miss. 1920).

[225] *See* BLOCK ET AL., *supra* note 14, at 36.

[226] The good faith standard, when applied by factfinders, operates like other duties of care. BRODSKY & ADAMSKI, *supra* note 73, § 2:04, at 13.

[227] Eisenberg, *supra* note 74, at 440. As noted above, the standard is in healthy simultaneously subjective and objective. *Id.*

[228] Attorney U v. Mississippi Bar, 678 So. 2d 963, 971 (Miss. 1996) (quoting HAZARD & HODES, *supra* note 216, § 402).

4. *The Duty Illustrated*

An illustration may be helpful at this point.[232] Jack Strapp is a legendary football hero in Mississippi and is presently the all-pro quarterback of a highly successful National Football League team. Strapp is one of the highest paid players in professional football and his promotional career has brought him considerable fame for his wealth as much as his football prowess. The president of Mississippi Widget Manufacturers, a corporation, is from Strapp's hometown and persuades him to serve as a director and, more importantly, as the highly publicized treasurer of MWM. Strapp is able to discharge his functions as a director throughout the year, attending board meetings, reading reports and the like. During the football season, however, Strapp fails to provide interim financial statements required by MWM's bylaws to be prepared by its treasurer. In fact, no such statements are prepared. By reason of its failure to have access to the monthly statements during the entire football season, the board was unaware that MWM had fallen on hard times and for several consecutive months its debt exceeded the debt-to-equity limitations in its credit arrangements, triggering default and a parade of financial horribles for the company. Unhappy minority shareholders, looking for a deep pocket, bring suit against Jack Strapp.

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[229] MISS. CODE ANN. §§ 79-4-8.30(e), -8.42(d) (1996). Notably, a director does not violate his duty of care when he deals his or her own stock unless the history of the closely-held corporation indicates a practice of purchasing its own stock in order to control a certain share of the corporation. Fought v. Morris, 543 So. 2d 167, 172 (Miss. 1989).

[230] As previously noted, Section 79-4-8.30(d) authorizes directors to consider the interests of so-called other constituencies, while officers are not. MISS. CODE ANN. § 79-4-8.30(d) (1996).

[231] *Id.* § 79-4-8.42. Section 79-4-8.41 provides that corporate officers have the authority to executive duties provided in the corporation's by-laws. *Id.* § 79-4-8.41.

[232] This example is loosely drawn from PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b, illus. 4, at 147-48.

Strapp will be held liable. By his failure to prepare the financial statements required by MWM bylaws, he breached his duty of care as an officer. Strapp "implicitly assumed the obligation to prepare the interim financial statements with reasonable care when [he] accepted the office of treasurer."[233] He also failed to perform the duties of the office of treasurer in a manner that he reasonably believed to be in the best interest of the corporation.[234] Strapp may not have known of the importance of the monthly financial statements, but any belief that they were unimportant would not be reasonable. Moreover, on these facts, Strapp would not have performed his office of treasurer with the care that an ordinarily prudent person would reasonably be expected to exercise in like position and under similar circumstances. Strapp's position and circumstances were those of treasurer of the corporation, not football player.

None of this is to suggest either MWM or Strapp were necessarily imprudent in striking their deal. MWM would always have the alternative of amending its bylaws to provide that the monthly financial statements would be prepared by the treasurer or, in the absence of the treasurer during the football season, by another designated individual, e.g., the assistant treasurer.[235] So long as Strapp reasonably expected the designated assistant treasurer to prepare the monthly financial statements during the football season, Strapp has not violated his duty of care.[236]

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[233] PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b, illus. 4, at 148. Arguably, under Mississippi law, Strapp would be held liable for failing to act as an "ordinary prudent person in a like position . . . under similar circumstances." MISS. CODE ANN. § 79-4-8.30(a)(2) (1996).

[234] MISS. CODE ANN. § 79-4-8.42(a)(3) (1996).

[235] *See* PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b, illus. 5.

[236] *Id.* The assistant treasurer as well as the corporation could arguably be held liable. *Id.* Note, however, that if Jack Strapp believed his assistant treasurer was incompetent, he could still be held liable. MISS. CODE ANN. § 79-4-8.42(c) (1996).

There is another point that need be noted. On the facts given, Jack Strapp has not breached his duty of care as a director. While his performance may not have been sterling, we are assuming he attended the meetings, read the reports and cast his votes in a minimally defensible way. The point, of course, is that a similarly worded duty, devolved upon director and officer, can yield differing results, depending upon the duties of director or officer and the particulars thereof. The example makes clear that there is no reason to separate the duties of director and officer, as the RMBCAAEIMAA has done. Given the commonality of language, however, there is no harm in the exercise, nor in the *Principles* draftsman's efforts to coalesce the duties of care of directors and officers into a single form of expression. And since there is no change of substance, there is hardly harm in the *Omnibank of Mantee* court's use of the *Principles* form of expression of the statutory species of the duties in force in Mississippi.[237]

5. Further Reflection On The Form Of The Duty

There is a sense in which the RMBCAAEIMAA expression of the duty of care is unremarkable. Section 79-4-8.30 in the case of directors, and Section 79-4-8.42 in the case of officers with discretionary authority, provide that corporate duties shall be discharged "with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[238] This may be vague and general and even malleable, but it is not noticeably different from this state's common law duty of care going back three-quarters of a century to *Ellis* and *Boyd*.[239] Indeed, a case can be made that, had they been pressed on the point, our early courts would have included within the duty the good faith and reasonable belief standards.

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[237] Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 84-85 (Miss. 1992). Notably, bank's officers are held to a higher standard than officers of other corporations. *Omnibank of Mantee*, 607 So. 2d at 85.

[238] *See supra* note 25 and accompanying text.

[239] *See supra* notes 11, 56-57, 101-05 and accompanying text.

In a very real sense, the RMBCAAEIMAA is but a codification of the long settled common law standard.

Still, there are many problems with this form of the rule. In the generality of its language, it inevitably means all things to all people, a legal chameleon where we least need one.[240] For example, Justice McRae has recently read Section 79-4-8.30 as meaning "a corporate director is called upon to be more than a figurehead. A corporate director cannot, in the course of exercising the duties of his office, stand idly by or bury his head in the sand."[241] So far so good. A director who simply fails to function altogether may well be a sitting duck when the plaintiff comes to town, and this is so no matter what the reason, e.g., prolonged ill health, without regard to whether the other board members may have excused his absence.[242] The *Turner* dissent continues: "[F]or any action taken, or for failure to take action, a corporate director must have exercised his duties in compliance with the statute."[243] But this turns the statute on its head. The statute says the director or officer may defend by showing his discharge of the three pronged duty of care.[244]

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[240] A few years ago Holmes the Lesser urged that Mississippi pretermit enactment of any statutory standards for the duty of care:

> [F]irst, that codification is not inherently superior to common law determinations of these issues; and second, that any statute adopted dealing with such currently controversial questions may not be determinative in the way courts decide cases. The risk that a standard either unreasonably high or undesirably lax might be enacted may be too great until the present flux in decisional law is resolved.

Holmes, *supra* note 19, pt. 1, at 202. Delaware is the most important of the states continuing to eschew the statutory form and to articulate its duty of care in the common law form. *See* KNEPPER & BAILEY, *supra* note 73, § 3-3.

[241] Turner v. Wilson, 620 So. 2d 545, 555 (Miss. 1993) (McRae, J., dissenting). Justice McRae also noted that the legislature intended for directors to actively manage their corporations. *Turner*, 620 So. 2d at 555 (McRae, J., dissenting). The *Principles* illustration even notes that if a director knows he will be unavailable due to ill health, he should take adequate actions to protect the company. PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b, illus. 1.

[242] *Turner*, 620 So. 2d at 555 (McRae, J., dissenting); *see also* PRINCIPLES, *supra* note 1, § 4.01(a) cmt. b, illus. 2 (noting that inaction for any reason renders director liable).

[243] *Turner*, 620 So. 2d at 555 (McRae, J., dissenting). Justice McRae noted that a director should be "more than a figurehead." *Id.* (McRae, J., dissenting).

[244] MISS. CODE ANN. § 79-4-8.30(e) (1996). A director is not liable if he, in

What it does not say is the converse, that the failure to discharge these duties translates into liability.[245] We would have thought it uncontroversial that, even though the plaintiff proves failure of one or more components of the duty, the director or officer may avoid liability if he prevails on a defense, ranging from the business judgment rule,[246] discussed below, to failure of causation[247] and the like. Justice McRae would have remanded the *Turner* case "for consideration by a jury properly instructed,"[248] presumably according to these same vague general standards.[249] We trust if he had been writing

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good faith, exercises reasonable care and acts in the "best interests of the corporation." *Id.* § 79-4-8.30(a)(1)-(3).

[245] The fundamental problem here is the RMA draftsman refusal to codify the business judgment rule, which is no more nor less appropriate for formulation rather than "continuing judicial development" than the duty of care. Just what forces would drive the RMA draftsmen would turn the courts of this land loose with § 8.30, .42 without a *Principles*—like formulation of business judgment rule is one of the deep mysteries. In this article I have advanced presentation of the business judgment rule ahead of a full exposition of the duty of care to emphasize the business judgment rule's prominence and dominance within its field.

[246] Professor Eisenberg here provides the interesting if misplaced view that what we have here is a divergence of standards of conduct, i.e., the duty of care from the standard of review, i.e., the business judgment rule. Eisenberg, *supra* note 74, at 437.

[247] *See* PRINCIPLES, *supra* note 1, § 4.01(d) (providing that plaintiff must prove corporation caused damage). "A director who fails to perform an oversight obligation . . . may have caused no damage to the corporation because the failure was rendered harmless by the care of other directors." PRINCIPLES, *supra* note 1, pt. IV, Introductory Note a, at 136; *see also id.* §§ 4.01(d), 7.18. Here the contextual point is that, in performing their functions and discharging their duties, directors act collegially. If a director's observance of his duty of care is questioned, courts will typically evaluate the conduct of the entire board. Substandard conduct on the part of a particular director can and ordinarily will be overcome by acceptable conduct, meeting the standard of care, on the part of other directors sufficient in numbers to perform the function or discharge the duty in question. (This is in contrast with a director's duty of loyalty and fair dealing, discussed *infra*, which will be evaluated on an individual basis).

[248] *Turner*, 620 So. 2d at 555 (McRae, J., dissenting). Justice McRae offered his opinion that on the facts of the case the question of director's liability was one for a jury to decide. *Id.* (McRae, J., dissenting).

[249] To be sure, on his general admonition to corporate directors quoted above, Justice McRae is right. The problem is that the standards, including the business judgment rule, are worded so generally that almost any question can be made a question for the jury by men with a bent of mind using the microscope of twenty-

for the Court he would have clarified and fleshed out his premises.

Then there is the "good faith" component of the duty of care.[250] No doubt heresy charges would attend the suggestion that it be removed, yet it is quite difficult to divine just what independent role "good faith" plays, as noted above. We can think of no failure of good faith that would not also offend some more specific component expressed or implicit in the duty of care. The problem is that so long as it appears in the form of an independent component of the duty of care, our courts—and particularly our trial courts providing jury instructions—will be driven to give it independent meaning when none is there. Think, for example, of the expression by Delaware Chancellor Allen, as reported by Professor Eisenberg, that an action by a director is not in good faith if it is based on "any human emotion [that] may cause a director to place his own interests, preferences or appetites before the welfare of the corporation" including "hatred, lust, envy, revenge, . . . shame or pride."[251] But, if no other component of the duty is breached, it is hard to imagine how the director's conduct may have harmed the plaintiff. Careful reflection on the good faith component of the duty suggests it should be seen and understood as an aspirational standard only.

One of the sobering lessons of recent American legal history is that vague, general (to the point of abstraction) liability standards inevitably leave the jury to its situation sense and

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twenty hindsight. *See, e.g.*, Stubblefield v. Jesco, Inc., 464 So. 2d 47, 54 (Miss. 1984) (articulating the court's limited authority to set aside a jury's verdict and reversing j.n.o.v. in favor of corporation). Once the trier of fact has resolved the point, the unsuccessful party will pay hell securing relief on appeal. *See* Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 88 (Miss. 1992) (noting that, notwithstanding the danger in "Monday morning quarterbacking" of director's decisions, the appellate court has a substantial duty of deference to findings of fact expressed or implicit in the trial court's decision).

[250] As previously noted, Mississippi law requires directors and officers to execute their duties "in good faith." MISS. CODE ANN. § 79-4-8.30(a)(1) (1996).

[251] Eisenberg, *supra* note 74, at 449 (quoting *In re* RJR Nabisco, Inc. Shareholders Litig., [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194, at 91,711 (Del. Ch. Jan. 31, 1989)).

enhance the potential for a mischievous verdict.[252] And this is so whether the state provides the standard through the statutory species of law or through its judge-made/common/case law. Such standards may not be so bad in car wreck cases. They are potentials for disaster in areas beyond the jury's ken and experience. Such standards are at once incentives to litigation and high transaction costs and in the end less than happy settlements, particularly where the stakes are high. Such incentives are often disincentives to investment and enterprise,[253] a matter of no small concern as this state struggles desperately for economic hope and growth.

There is an insight here, and it is worth a pause. At least two forces are driving the law of corporate governance toward generality of statement. As the generality of the phrasing of rules of law is increased, so is the likelihood of warring factions finding consensus on that wording. Each sees its interests, values and prejudices less threatened as the wording approaches abstraction. We all agree these cases should be decided justly and fairly. We reach consensus, however, at the costs just noted.

Second, there is the quite reasonable fear that lawmakers may not fully foresee all of the nuances of the cases likely to arise. It is no accident that one of the foremost premises advanced in the *Principles* Introductory Note to the duty of care is the emphasis:

> at the outset . . . that these are general legal standards and that their application, in most instances, will involve subtle evaluations of specific facts and circumstances. The complexity and scale of many modern corporations—and unavoidable uncertainties and complexities related to the roles of directors and officers—caution against unrealistic, harsh applications of [these] general standards.[254]

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[252] The point needs to be seen and understood in the context of the perennial debate whether this is good and what the jury system is all about and whether this may be made consistent with our respect for the rule of law.

[253] *See supra* Part II and accompanying text.

[254] PRINCIPLES, *supra* note 1, pt. IV, Introductory Note a, at 134.

In a very real sense, the level of generality of legal language represents a decision on the extent to which cases should be decided before they arise. The language lying in the field of corporate governance here under review answers within a unmistakable, "Not very many."

6. *What The Duty Tells The Director To Do*

All of this leads to problems at the other end. The corporate director or officer quite reasonably asks of his lawyer, "But what must I do?"[255] This imports the need for less generality and greater specificity in the form of rules. The American Law Institute clearly saw the problems inherent in the generality of language—not to mention the gaps—in the Revised Model Act.[256] ALI sought to speak to the point and so became embroiled—within its traditionally dignified and academic deliberation—in controversy that outlasted the decade of the 1980s.[257] The *Principles of Corporate Governance* seek to add flesh to the duty of care and, as well, the duty of fair dealing, a discrete corner of the duty of loyalty, and does so more elaborately than any previous black letter project in the field. Particularly ambitious is the commentary that gives flesh to each subpart and each important phrase within the black letter expression of the duties.[258] It is appropriate that the ALI project is labeled "Principles"[259] but within its sphere it offers

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[255] Robertson & Clark, *supra* note 27, pt. 1, at 16. He also legitimately demands a broad range of business decisions where he should not have to call his lawyer. *Id.*

[256] REVISED MODEL BUS. CORP. ACT. § 8.30 (1984). The language of the act, though similar to the Principles, is broad and non-specific. *See, e.g.*, *id.* § 8.41 (proscribing general duties for corporate officers).

[257] *See supra* note 70 and accompanying text.

[258] *See, e.g.*, PRINCIPLES, *supra* note 1, § 5.01 cmt. a-c (outlining comparison with present law, implementation and suggested operation of rule).

[259] In a Forward to *Principles of Corporate Governance*, ALI President Roswell B. Perkins reports:

> The term "Principles" in the title of the Project was not intended to denote a level of treatment different from that found in traditional ALI Restatements . . . . The term was not an expression of a purpose to

greater guidance than the rules of the Revised Model Act, even with its common law augmentations in the various states, or the common law of those states without statutory duties.

For example, *Principles* § 4.01(a) includes within the duty of care an important and carefully worded duty of inquiry, phrased in the form of an objective or external standard:

> (1) The duty [of care] includes the obligation to make, or cause to be made, an inquiry when, but only when, the circumstances would alert a reasonable director or officer to the need therefor. The extent of such inquiry shall be such as the director or officer reasonably believes to be necessary.[260]

Principles, § 4.01(a)(2) provides a right to rely,[261] for all practical purposes in states like Mississippi mirroring the standards of Sections 79-4-8.30(b) and -8.42(b).[262] The *Principles of Corporate Governance* then add a director's power to delegate:

> (b) Except as otherwise provided by statute or by a standard of the corporation [§ 1.36] and subject to the board's ultimate responsibility for oversight, in performing its functions (including oversight functions), the board may delegate, formally or informally by course of conduct, any function (including the function of identifying matters requiring the attention of the board) to committees of the board or to directors, officers, employees, experts, or other persons; a director may rely on

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> deal in generalities. It was intended, rather, to signify that neither a model state corporation law nor a new Federal corporation law would be drafted. The Project was to focus on issues of governance responsibilities and to state existing or recommended ground rules—some to be implemented by the courts, some by legislatures, and some by corporations themselves.

PRINCIPLES, *supra* note 1, *President's Forward*, at XX-XXI.

[260] *Id.* § 4.01(a)(1). Case law generally recognizes the "inquiring" obligation. *Id.* § 4.01 cmt. a.

[261] *Id.* § 4.01(a)(2). This subsection provides a right to rely on "materials and persons," including directors, other officers and employees, committees, and information promulgated by them. *Id.* §§ 4.02-.03.

[262] MISS. CODE ANN. §§ 79-4-8.30(b), 79-4-8.42(b) (1996). Under Mississippi law, a director or officer is entitled to rely on information and reports prepared by experts, employees or other pertinently qualified professionals. *Id.*

> such committees and persons in fulfilling the duty under this Section with respect to any delegated function if the reliance is in accordance with §§ 4.02 and 4.03.[263]

In states with (thankfully) little litigation in the field of corporate governance, such black letter addenda to the statutes are quite welcome.

7. *Burden Of Proof*

One important subsection of the *Principles*' duty of care addresses the burden of proof. Section 4.01(d) provides:

> A person challenging the conduct of a director or officer under this Section has the burden of proving a breach of the duty of care, including the inapplicability of the provisions as to the fulfillment of duty under Subsection (b) or (c), and, in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the corporation.[264]

More accurately, the person challenging the conduct of the director or officer bears both the burden of production and the burden of persuasion on these points. This subsection has been criticized for saying "nothing about the degree of deference to be given to any evidence presented by the directors, and, therefore, the amount of evidence necessary for the plaintiff to overcome the defendant's evidence."[265] The criticism is no more or less valid than in any other case governed by our generally worded allocations of the burdens of going forward and proving a point.

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[263] PRINCIPLES, *supra* note 1, § 4.01(b). Subsection (b) proposes to provide slightly broader protection than existing law. *Id.* § 4.01 cmt. a, at 140.

[264] *Id.* § 4.01(d). The *Omnibank of Mantee* opinion does not mention this section of *Principles*. However, it seems an appropriate statement of the law in Mississippi. In non-statutory Delaware, the person challenging the conduct of an officer is saddled with a similar burden because of the business judgment rule. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1162 (Del. 1995).

[265] Balotti & Hanks, *supra* note 132, at 1337, 1353. The commentators also note the problem of the ALI not requiring any form of specialized pleading of the business judgment rule. *Id.*

8. The Tyranny Of Labels

A word of caution, and it is important. Lawyers love labels, and so it is inevitable that they will propose jury instructions and other conclusions of law that will try to force the duty of care within and under notions of negligence and gross negligence, plaintiffs preferring the former and defendants the latter. In this state, we have already seen a very public display of this perennial penchant in Senate Bill 2389, discussed below.[266] The last thing we need are labels for the standards that make up the duty of care that will only compound confusion and enhance the probability of lawless adjudication. The substantive content of the duty is problem enough.

We have explained how historically the common law duty of care for corporate directors and officers evolved through bank cases. For better or for worse, the Court began using "negligence" as the label for the conduct by a director or officer that would subject him to liability.[267] No less an authority than Prof. Eisenberg has found the duty of care but a special instance of the law of negligence.[268] Yet Dean Robert Clark has read the cases across the land and reported "the case law experience must still lead us to wonder whether the courts are serious when they say directors may be *held liable* for negligence."[269] And the *Principles* reporters now tell us "[r]elatively few [duty of care] cases have imposed personal liability for damages."[270]

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[266] MISS. CODE ANN. § 81-5-105 (1996). Arguably ambiguous, section 81-5-105 establishes the standard of care for bank directors. *Id.*; *see also infra* notes 271-81 and accompanying text.

[267] Ventress v. Wallace, 71 So. 636, 640 (Miss. 1916). The charge in *Ventress* alleged "willful, wanton and gross negligence in the management of the affairs of . . . the bank." *Ventress*, 71 So. at 640; *see also* Boyd v. Applewhite, 84 So. 16, 22 (Miss. 1920) (discussing bank directors' negligence).

[268] Eisenberg, *supra* note 74, at 439. Eisenberg also notes that directors are responsible for overseeing a corporation's objectives, monitoring the conduct of the business, and evaluating, appointing and reviewing senior executives. *Id.*; *see* PRINCIPLES, § 4.01(a), Reporter's Note 15, at 158 (noting reasonable care standard accepted in majority of states).

[269] CLARK, *supra* note 20, § 3.4, at 126. Dean Clark notes that negligence is often confused with conflict of interest transactions. *Id.*

[270] PRINCIPLES, *supra* note 1, pt. IV, Introductory Note b, at 136. The note goes on to recognize that thirty states have enacted measures meant to lessen

The RMBCAAEIMAA established a common statutory framework for the duty of care covering the directors and officers of all corporations, including banks, and Mississippi appears to embrace the ALI's *Principles* with their elaboration and commentary fleshing out the statutory structure. As noted above, nothing in the Act suggests any shift from Mississippi's traditional view of the duty. Still, a case may and probably should be made that "the care an ordinarily prudent person in a like position would exercise under similar circumstances"[271] presents a confusing incorporation of the traditional tort/negligence standard.[272]

Consider Delaware, that state which still uses a common law species of the duty of care.[273] Its wording is similar to the RMBCAAEIMAA. The Delaware Supreme Court has noted that "a long line of Delaware cases holds that director liability is predicated on a standard which is less exacting than simple negligence."[274] Delaware's reading of the rule is generally seen as importing a gross negligence standard.[275] The Fifth

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directors' liability. *Id.*

[271] MISS. CODE ANN. § 79-4-8.30 (1996).

[272] In *Resolution Trust Corp. v. Scott*, 929 F. Supp. 1001 (S.D. Miss. 1996), Chief Judge Barbour characterized the present Mississippi standard as "one of simple negligence," adding immediately that the duty of care standard "was subject to a well-settled common law defense known as the business judgment rule." *Resolution Trust Corp.*, 929 F. Supp. at 1018 (citing Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 85 (Miss. 1992)).

[273] For example, the statutory language resembles, in substance, the phrase "[n]egligence . . . connotes a failure to exercise reasonable care under the circumstances." Smith v. City of West Point, 475 So. 2d 816, 818 (Miss. 1985) (citing Cole v. Delchamps, Inc., 152 So. 2d 911, 913 (Miss. 1963)).

[274] Aronson v. Lewis, 473 A.2d 805, 812 n.6 (Del. 1984). The *Aronson* court noted that the duty was defined using theories of gross negligence. *Aronson*, 473 A.2d at 812. Given the liability holding in *Van Gorkom*, the case may easily be made that the Delaware court was applying a far stricter standard than "gross negligence" would ordinarily suggest. *Van Gorkom* stands out as a failure of the court to perform its most fundamental adjudicative responsibility: rendering a judgment that achieves a substantial congruence between declared rule and official action. *See also* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) (noting that business judgment rule requires directors to act according to best interests of shareholders), *aff'd sub nom.* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995).

[275] Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985). The court explicitly

Circuit has found a gross negligence standard in Louisiana[276] and Texas.[277]

In the 1994 session of the Mississippi Legislature, the banking dimension of the law of corporate governance took a curious turn. Senate Bill No. 2389[278] at once (and arguably disingenuously)[279] seeks "to clarify the applicable standard of care"[280] for the directors and officers of banks and bank holding companies and cut that standard adrift from the mainstream of corporate governance law. The heart of Senate Bill 2389 "clarifies that" bank directors and officers are subject to a duty of care measured by a gross negligence standard.[281] Sim-

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affirmed that liability is predicated upon concepts of gross negligence. *Id.* (citing *Aronson*, 473 A.2d at 812); *see also* BLOCK ET AL., *supra* note 14, at 64-65.

[276] Resolution Trust Corp. v. Miramon, 22 F.3d 1357, 1365 (5th Cir. 1994). The court also noted that the Financial Institutions Reform, Recovery and Enforcement Act, hereinafter FIRREA, preempted the federal common law concerning the standard of care required of bank directors. *Resolution Trust Corp.*, 22 F.3d at 1364; *see also* Louisiana World Exposition v. Federal Ins. Co., 864 F.2d 1147, 1151 (5th Cir. 1989) (noting that under Louisiana law simple negligence is insufficient to establish liability of director).

[277] Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707 (5th Cir. 1984) (applying Texas law). The *Gearhart* court noted that Texas courts impose liability on a director only if his actions are ultra vires or fraudulent. *Gearhart*, 741 F.2d at 721.

[278] MISS. CODE ANN. § 81-5-105 (1996). Section 81-5-105 established the standard of care for bank directors by providing that they will not be held negligent unless they act "in a grossly negligent manner." *Id.* § 81-5-105(2). Gross negligence is defined as "reckless disregard of, or a carelessness amounting to gross indifference to the best interest of the bank . . . and involves a substantial deviation below the [normal] standard of care." *Id.* § 81-5-105(5).

[279] Chief Judge Barbour has noted that section 81-5-105 is more than just a clarifying statute: "[T]he statute apparently was enacted, at least in part, to overrule the *Omnibank [of Mantee]* standard." *Resolution Trust Corp.*, 929 F. Supp. at 1018. My questions about the new statute go to its premises, the necessity for it (or lack thereof) and its wisdom (or lack thereof). I have no doubt of its enforceability. The statute has recently been upheld and enforced retroactively, and appropriately so, in *Resolution Trust Corp. v. Scott*, 887 F. Supp. 937, 941-42 (S.D. Miss. 1995) and *Resolution Trust Corp. v. Scott*, 929 F. Supp. 1001, 1015-25 (S.D. Miss. 1996). *Resolution Trust Corp.* stated that a director's liability was limited to claims for gross negligence, intentional tortious conduct, intentional breach of loyalty, and corporate waste. *Resolution Trust Corp.*, 887 F. Supp. at 942.

[280] S.B. 2389, Reg. Sess. (Miss. 1994). The bill was also introduced to define the "standard of care" for bank directors. *Id.*

[281] The source of this law was fear of FIRREA. 12 U.S.C. § 1821(k) (1994).

ple negligence will not suffice. The defendant bank director or officer may not be mulcted for damages unless he "acted in a grossly negligent manner"[282] or acted intentionally. Accepting that the law can define any term it wishes any way it wishes,[283] we find in Section 1(5) of Senate Bill 2389 that gross negligence means "a reckless disregard of, or a carelessness amounting to gross indifference to, the best interests of the bank or bank holding company or the shareholders thereof." So far so good. This has the virtue of according with the way lawyers customarily think of gross negligence. But Section 1(5) continues, following the conjunction "and" and positively declares that "gross negligence" also "involves a substantial deviation below the standard of care expected to be maintained by a reasonably careful person under the circumstances."[284] This, unfortunately, is the way most lawyers think of simple negligence.[285]

FIRREA provides that in the case of an insured depository institution a director or officer may be held liable for gross negligence. *Id.* However, FIRREA would respect a more relaxed standard if such were provided by state law. *Id.* FIRREA provides that "[n]othing in this [act] shall impair . . . any right of the corporation under other applicable law." *Id.* Where the state recognized a right of recovery from a director or officer on grounds of simple negligence, a number of courts held this claim remained viable and unaffected by FIRREA. FDIC v. Canfield, 967 F.2d 443, 446 (10th Cir. 1992); *see also* FDIC v. Gonzalez-Gorrondona, 833 F. Supp. 1545, 1554 (S.D. Fla. 1993) (allowing Florida's state standard to apply in diversity actions). The driving force behind Senate Bill 2389 was no doubt to avoid such results in Mississippi. For a full discussion see BLOCK ET AL., *supra* note 14, at 67-69.

[282] MISS. CODE ANN. § 81-5-105(2) (1996).

[283] *See* Richardson v. Canton Farm Equip., Inc., 608 So. 2d 1240, 1250 (Miss. 1992) (instance in which supreme court interpreted section 31-7-5(1) of the Mississippi Code as referring to compensatory damages). As Lewis Carroll had Humpty Dumpty explain it to Alice:

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Humpty Dumpty, "whether, you can make words mean so many different things." "The question is," said Humpty Dumpty," which is to be master—that's all."

LEWIS CARROLL, THROUGH THE LOOKING GLASS 5 (1896).

[284] S.B. 2389, Reg. Sess. (Miss. 1994).

[285] That the positive law may with effect "define a term or phrase in a manner not necessarily consonant with common understanding" hardly suggests virtue

Much could and should be said of Senate Bill 2389, and little of that would be complimentary. It follows the familiar pattern of legislation promoted by an interest group to thwart pending and threatened litigation. As usual, the law is "clarified" retroactively.[286] It inevitably suggests the bizarre view that directors and officers of the run of business corporations are held to a stricter standard of care than bank directors and officers.[287] Still, we trust our judges will take the new law seriously.[288] On their oaths they must where "the language of the statute merely makes . . . [the legislature] look foolish."[289]

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attends the practice. Mississippi State Tax Comm'n v. Moselle Fuel Co., 568 So. 2d 720, 723 (Miss. 1990).

[286] In a variety of contexts, the court has allowed subsequent legislation to inform the pre-enactment content of the law. Mississippi Dept. of Human Servs. v. Marquis, 630 So. 2d 331, 334-35 (Miss. 1993); *see also Richardson*, 608 So. 2d at 1251 (applying statute authorizing court to assess "compensatory damages" against public official); Estate of Stamper v. Edwards, 607 So. 2d 1141, 1149 (Miss. 1992) (applying statutory amendment clarifying that certificates of deposit were "deposits" within statute and clarifying context of statute's presumption of survivorship rights). Chief Judge Barbour, faced with conflicting readings of the standard proffered by counsel, finesses: "If this case were to proceed to trial, the Court would be required to instruct the jury using the precise language contained in section 81-5-105(5) . . . ." Resolution Trust Corp. v. Scott, 929 F. Supp. 1001, 1018 (S.D. Miss. 1996).

[287] *Compare and contrast supra* note 114 and accompanying text.

[288] As explained above, see p. 16, *supra*, "any interpretation of a legal text first and foremost [must] fit that text rather than some other text we may wish we had before us." Beyond this, Senate Bill 2389 should be given that reading which proceeds from the best justification we can imagine for that statute today augmented by our best efforts to afford the text a reading consistent on principle with the field at large. Resolution Trust Corp. v. Scott, 887 F. Supp. 937, 941-42 (S.D. Miss. 1995) and Resolution Trust Corp. v. Scott, 929 F. Supp. 1001 (S.D. Miss. 1996). As previously stated, the *Resolution Trust Corp.* court was applying FIRREA. *Resolution Trust Corp.*, 887 F. Supp. at 940.

[289] Kansas City S. Ry. v. McNamara, 817 F.2d 368, 373 (5th Cir. 1987). The *McNamara* court also noted that strict adherence to statutory language will often result in absurdities and only in this latter instance may a court force a more reasonable reading of the statute. *McNamara*, 817 F.2d at 373; *see also* Mississippi Casino Operators Ass'n v. Mississippi Gaming Comm'n, 654 So. 2d 892, 894 (Miss. 1995) (observing that strict interpretation of Mississippi gaming provisions would produce unreasonable interpretation).

VIII. DUTY OF LOYALTY[290]

A. Pre-RMBCAAEIMAA History

There is a perception afoot that people with conflicts of interest should be shot at dawn. We see this in the media's slant on those who manage the people's business. Of late, the judiciary of this state has been particularly hard-nosed,[291] and not only in the public domain.[292] There is no reason to think the arena of corporate governance exempt from these prejudices.

Within a corporate family, duties of loyalty, good faith and fair dealing are normally thought owed by directors and officers. In a close corporation setting, the law imposes these duties as well upon controlling or insider shareholders,[293] although invariably these individuals are also directors or officers, or both. The content and behavioral parameters of the duties remain the same. In fact, most of this state's litigation in the corporate governance area in the last several decades has concerned the duty of loyalty. Here the trust model and notions of fiduciary duties are much closer to the mark. Here the judicial use of that model and those notions yield an apt fit—the round hole is ready made for the round peg.

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[290] 3 FLETCHER ET AL., *supra* note 121, § 837.60 (noting that duty often involves conflicting interests); BRODSKY & ADAMSKI, *supra* note 73, §§ 3.03-.08 (reviewing standard of care, breach of duty in general); KNEPPER & BAILEY, *supra* note 73, §§ 4-1 to 4-24 (commenting and reporting that "[l]oyalty is absolute").

[291] Towner v. Moore *ex rel.* Quitman County Sch. Dist., 604 So. 2d 1093, 1100 (Miss. 1993). In *Towner*, the Mississippi Supreme Court affirmed violation of public interests statute by husband school board member and wife school teacher. *Towner*, 604 So. 2d at 1100; *see also* Smith v. Dorsey, 599 So. 2d 529, 549 (1992) (affirming taxpayer action against school board members); Frazier v. State *ex rel.* Pittman, 504 So. 2d 675, 702-04 (Miss. 1987) (finding official violated conflict of interest statute by authorizing county to do business with bank of which he was officer and shareholder).

[292] Hendricks v. James, 421 So. 2d 1031, 1045 (Miss. 1982). The *Hendricks* court invalidated a contract because of the exertion by one party of undue influence. *Hendricks*, 421 So. 2d at 1045.

[293] Fought v. Morris, 543 So. 2d 167, 170-71 (Miss. 1989). The *Fought* court held that stockholders in closely held corporations must keep smaller stockholders in mind when taking actions. *Fought*, 543 So. 2d at 171; *see also* Mullenberg v. Bikon Corp., 669 A.2d 1382, 1388-89 (N.J. 1986) (holding excessive compensation violated closely-held corporation's directors' duty of loyalty).

The mother of all duty of loyalty/conflict of interest wars in Mississippi is the much "cussed" and discussed *Knox Glass Bottle Co.* case.[294] Rather than use company equipment, director/president Roy Underwood had his corporation, Knox Glass Bottle Company, begin leasing a number of trucks from his brother, two nephews and one of their business associates, all of whom were directors of the corporation.[295] The leases were quite profitable to the lessors.[296] After Roy's death, his brother C. R. Underwood became president of the company and continued the leasing practice.[297] For the period before Roy's death, the Court upheld the leases, relying, *inter alia*, on the business judgment rule, as noted above.[298] Roy had no personal interest in the leases.[299] Concentrating on the period after Roy's death, the Court held the directors' self-interested leases offended their duty of loyalty and ordered them to account for all profits from truck rentals.[300] In stating the duty of loyalty,

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[294] Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799 (Miss. 1956). In *Knox Glass Bottle Co.*, the corporation sued its directors for personal profits the company alleged were stolen. *Knox Glass Bottle Co.*, 89 So. 2d at 803. *See generally* Hodge & Perry, *supra* note 18, at 386-90 (commenting on conflicts of interests in stockholder actions against directors); Holley, *supra* note 18, at 889-95 (updating legal problems concerning transactions involving interested directors).

[295] *Knox Glass Bottle Co.*, 89 So. 2d at 804-05. The trucks were used to haul glass bottles and assorted items. *Id.* at 805.

[296] *Id.* The defendants represented both sides in the contractual relationship. *Id.*

[297] *Id.* at 804. There were eleven named defendants in the action, all of whom the plaintiff alleged benefited from the arrangement. *Id.* at 805.

[298] *Id.* at 818.

[299] *Id.* at 805. All profits from the arrangement were divided among all shareholders. *Id.* One of the fundamental requisites of access for the business judgment rule requires that the director or officer should not have an interest when exercising his or her business judgment. PRINCIPLES, *supra* note 1, § 4.01(c)(1), *quoted in* Omnibank of Mantee v. United S. Bank, 607 So. 2d 76, 85 (Miss. 1992). A director may be "interested," for example if he or she has a "business, financial, or familial relationship with a party to the transaction." PRINCIPLES, *supra* note 1, § 1.23(a)(2).

[300] *Knox Glass Bottle Co.*, 89 So. 2d at 819. The court ordered the defendants to reimburse the company for profits garnered after January 1, 1952. *Knox Glass*, 89 So. 2d at 819.

Knox Glass Bottle Co. again quoted treatise authority to the effect that directors and officers of a corporation, acting in their official capacities, may not "make any profit, or acquire any other personal benefit or advantage, not also enjoyed by the other stockholders."[301]

Fleshing out the premise, the court continued that neither director nor officer is entitled to any profits from the corporation "beyond the earnings on his stock, a proper compensation and expenses."[302]

Directors and officers owe their duties of loyalty, good faith and fair dealing in all events to the corporation itself.[303] In some instances, officers and directors owe direct duties to shareholders as well.[304] *Gibson v. Manuel*[305] holds the duty is owed to shareholders and to pledgees of shares. Where the right is one belonging to the corporation, it may be enforced only by the corporation or by shareholders only through a derivative action.[306] Where the duty is owed to a shareholder qua shareholder, he may enforce the right by a direct action.[307]

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[301] *Id.* at 815 (quoting 3 FLETCHER ET AL., *supra* note 121, § 884, at 363). The court went on to note that directors are held to the same "strict standards of rectitude that bind a fiduciary." *Id.* (quoting 3 FLETCHER ET AL.,, *supra* note 121, § 884, at 363)

[302] *Id.* (quoting 3 FLETCHER ET AL., *supra* note 121, § 884, at 363); *see also* Gibson v. Manuel, 534 So. 2d 199, 201-02 (Miss. 1988) (ruling that sole shareholder breached duty by "looting" corporation of assets, rendering it unable to pay debts); American Empire Life Ins. Co. v. McAdory, 319 So. 2d 237, 240-41 (Miss. 1975) (holding directors breached duty by misappropriating corporate funds); Cooper v. Mississippi Land Co., 220 So. 2d 302, 307-10 (Miss. 1969) (holding directors and officers breached duty by converting and hiding assets to defraud shareholders over money by the corporation).

[303] Hill v. Southeastern Floor Covering, Inc., 596 So. 2d 874, 872 (Miss. 1992). The *Hill* court held that directors and officers have a duty not to put their own opportunity to earn money ahead of the corporation's opportunity to make money. *Hill*, 596 So. 2d at 877; *see also* Ellzey v. Fyr-Pruf, Inc., 376 So. 2d 1328, 1332 (Miss. 1979) (ruling similarly and noting that directors' intentions must rise above those of normal marketplace).

[304] *See supra* note 15; *see also* Home Tel. Co. v. Darley, 355 F. Supp. 992, 999 (N.D. Miss. 1973) (noting autonomy of director and corporation); Derouen v. Murray, 604 So. 2d 1086, 1092 (Miss. 1992) (holding that director or officer is in fiduciary relationship with his corporation and its shareholders); Fought v. Morris, 543 So. 2d 167, 171 (Miss. 1989) (commenting that directors must exercise "utmost good faith and loyalty in discharge of [their] corporate office").

[305] 534 So. 2d 199, 202 (Miss. 1988). The *Gibson* court further concluded that a similar duty is owed because both parties are similarly situated. *Gibson*, 534 So. 2d at 202.

B. Omnibank and Fought And Today's Non-Statutory Backdrop

This dimension of the law of corporate governance speaks to cases where a director, officer or controlling shareholder acts with an interest in a matter. By definition, outside and other disinterested directors are not addressed.[308] In *Omnibank of Mantee* the court referred to the duty of loyalty as "a multifaceted duty," a duty "of good faith, a central sphere of which" addressing pecuniary self interests "has been recently renamed the duty of fair dealing."[309] The opinion goes on to say

> [t]he duty obtains most directly when the officer is interested personally in a matter affecting the corporation. The concept of interest is broadly defined and includes cases where the officer has a relationship with a party to the transaction that may reasonably be expected to affect the officer's judgment or is subject to the influence and domination of such a party . . . Yet the duty goes beyond this and is coextensive with the legitimate, enduring interests of the corporation. Loyalty to those interests is the corporation's due.[310]

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[306] *Derouen*, 604 So. 2d at 1091; *see also* Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1063 (Miss. 1984) (commenting on cause of actions of individual stockholders).

[307] *Fought*, 543 So. 2d at 171-72. Directors and other corporate officers hold a "fiduciary or quasi-trust" position in relation to shareholders as a group, and if they violate this trust they may be held accountable. *Id. See, e.g., Vickers*, 458 So. 2d at 1062 (applying rule where bank breached agreement to provide corporation with interim ship construction financing).

[308] PRINCIPLES, *supra* note 1, pt. V, Introductory Note a, at 199.

[309] *Omnibank of Mantee*, 607 So. 2d at 90. The *Omnibank of Mantee* suit was brought by the buyer of a branch bank against the branch's loan officer and the seller, to recover losses stemming from several unsecured loans which the loan officer had approved after the sale. *Id.* at 78-81.

[310] *Id.* at 90. Just when a director or officer has an impermissible "interest" in a given matter has been addressed specifically in the *Principles of Corporate Governance*:

> (a) A director . . . or officer . . . is "interested" in a transaction or conduct if either:
>
> (1) The director or officer, or an associate [§ 1.03] of the director or officer, is a party to the transaction or conduct;
>
> (2) The director or officer has a business, financial, or familial relationship with a party to the transaction or conduct, and that relationship would reasonably be expected to affect the director's or officer's judgment with respect to the transaction or conduct in a manner adverse to the corporation;
>
> (3) The director or officer, an associate of the director or officer, or a person with whom the director or officer has a business, financial, or familial relationship, has a material pecuniary interest in the transaction or conduct (other than usual and customary directors' fees and benefits) and that interest and (if present) that relationship would reasonably be expected to affect the director's or officer's judgment in a manner adverse to the corporation; or
>
> (4) The director or officer is subject to a controlling influence by a party to the transaction or conduct or a person who has a material pecuniary interest in the transaction or conduct, and that controlling influence could reasonably be expected to affect the director's or officer's judgment with respect to the transaction or conduct in a manner adverse to the corporation.

PRINCIPLES, *supra* note 1, § 1.23(a). An "associate" of a director or officer, within the meaning of *Principles* § 1.23(a), has been further defined:

> (a) "Associate" means:
>
> (1) (A) The spouse (or a parent or sibling thereof) of a director [§ 1.13], senior executive [§ 1.33], or shareholder, or a child, grandchild, sibling, or parent (or the spouse of any thereof) of a director, senior executive, or shareholder, or an individual having the same home as a director, senior executive, or shareholder, or a trust or estate of which an individual specified in this Subsection (A) is a substantial beneficiary; or (B) a trust, estate, incompetent, conservatee, or minor of which a director, senior executive, or shareholder is a fiduciary; or
>
> (2) A person [§ 1.28] with respect to whom a director, senior executive, or shareholder has a business, financial, or similar relationship that would reasonably be expected to affect the person's judgment with respect to the transaction or conduct in question in a manner adverse to the corporation.
>
> (b) Notwithstanding § 1.03(a)(2), a business organization [§ 1.04] is not an associate of a director, senior executive, or shareholder solely because the director, senior executive, or shareholder is a director or principal manager [§ 1.29] of the business organization. A business organization in which a director, senior executive, or shareholder is the beneficial or record holder of not more than 10 percent of any class of equity interest [§ 1.19] is not presumed to be an associate of the holder by reason of

The *Omnibank of Mantee* court continued:

> The duty of loyalty takes no canonical form. It is as complex as corporate interests and officer temptations and means of descent from grace. It partakes of the objective as well as the subjective. If, for example, an officer neglects the substantial interests of his corporate principal by preferring another in a matter of importance, the officer may well offend his duty of loyalty though his heart be pure. In such a case we would not concern ourselves with the officer's subjective intent but with the content of his conduct reasonably viewed by objective third persons. We would ask whether there be a rational basis for a belief his action was in the entity's best interest and not whether in fact he held such a belief.[311]

Omnibank of Mantee offers a subjective dimension of the duty of loyalty:

> As members of the human race and participants in original sin, corporate officers at times consciously pursue the interests of self and others to the neglect of their principal. They may seize opportunities for profit they know belong to their corporations. At other times they steal and embezzle and defraud the corporations they serve, and so their malignant mind becomes our central focus; hence, the subjective side of the duty of loyalty.[312]

> the holding, unless the value of the interest to the holder would reasonably be expected to affect the holder's judgment with respect to the transaction in question in a manner adverse to the corporation. A business organization in which a director, senior executive, or shareholder is the beneficial or record holder (other than in a custodial capacity) of more than 10 percent of any class of equity interest is presumed to be an associate of the holder by reason of the holding, unless the value of the interest to the holder would not reasonably be expected to affect the holder's judgment with respect to the transaction or conduct in question in a manner adverse to the corporation.

Id. § 1.03. In the case of Section 1.03(a), compare the RMBCAAEIMAA, MISS. CODE ANN. § 79-4-8.60(3).

[311] *Omnibank of Mantee*, 607 So. 2d at 90.

[312] *Id.* The court noted that the chancery court had found no evidence that the loan officer's conduct had resulted from fraud, dishonesty, or other misconduct. *Id.*

As noted above, proof of the "malignant mind" outside the rare case of a conscience stricken confession is a circumstanced external enterprise, one which in practical effect sees the factfinder deciding what a reasonable and knowledgeable, similarly situated director or officer, doing what was done, would most likely have intended.

Mississippi law recognizes that, by reason of practical circumstance, minority interest shareholders in a close corporation are in need of special protection. In *Fought v. Morris*, the court speaks of the "acute vulnerability of minority shareholders in . . . [a close] corporation."[313] The minority shareholder is invariably at a disadvantage in his relative lack of (access to) intra-corporate information regarding matters with which he is concerned. For example, when a majority shareholder seeks to purchase the shares of a minority shareholder, one problem the prospective seller experiences is that "a fair market for the shares is seldom available."[314] Because this is so, directors/officers negotiating for the purchase of shares owe a duty of full disclosure to the selling shareholder and must pay fair market value for the shares.[315]

Once it is shown that a fiduciary has engaged in a transaction with one to whom he owes a duty of loyalty and that his interests conflict with those of the party with whom he has dealt, general Mississippi law requires that he bear the burden of justifying his conduct.[316] The reasons for this view are

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at 90-91.

[313] *Fought*, 543 So. 2d at 170. A close corporation is defined as a business entity which has few shareholders, and whose shares are not publicly traded. *Id.* at 169.

[314] *Id.* at 170. Thus, the minority shareholder can neither afford to leave the corporation, nor safely remain with the corporation. *Id.* at 171.

[315] *Id.* at 173, 174. *Fought* concerned a case where one shareholder was buying the shares of another. *Id.* at 169. There is no essential difference between the situation where insiders are buying pro rata the shares of a minority interest shareholder or where they are having the corporation buy the interest of the minority shareholder. Either way the buyer is interested in the transaction. Either way the minority shareholder is being taken out of the corporation and the buyer/insider's interest is increased.

[316] *Id.* at 172. Once the fiduciary takes action to make a profit or acquire

found in the vulnerability of the party to overreaching by his fiduciary and the obligations of trust and confidence the fiduciary has voluntarily accepted. More pragmatically, it is fair to place this burden on the fiduciary because he will almost always have superior access to facts and reasons that may explain or justify his conduct.

This view applies in corporate governance. In *Ellzey v. Fyr-Pruf, Inc.*,[317] the court held that the burden rests on the fiduciary to justify his conduct and to prove disclosure, ratification and the inherent fairness of his dealings with those to whom the duty is owed, citing *Knox Glass Bottle Co.*[318]

C. The Director's Statutory Safe Harbor

Traditionally upon application to the court and proper proof, the corporation could have voided any transaction made in offense to the duty of loyalty.[319] The perceived fiduciary nature of the duty was seen to demand no less. The *Knox Glass Bottle Co.* court did at least recognize that there could be occasions where ratification upon "full disclosure" or estoppel might preclude an action against directors and officers for breach of

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other benefits or advantages for himself, excluding the shareholders, he may be made to account to those shareholders. *Id. See, e.g., In re* Will of Fankboner, 638 So. 2d 493, 495 (Miss. 1994) (applying rule in will contest where primary beneficiary was actively involved in procurement and preparation of testator's will); Mullins v. Ratcliff, 515 So. 2d 1183, 1192-96 (Miss. 1987) (applying rule where presumption of undue influence arose due to grantee being guardian of grantor's estate).

[317] 376 So. 2d 1328, 1332 (Miss. 1978).

[318] *Ellzey*, 376 So. 2d at 1332 (citing Knox Glass Bottle Co. v. Underwood, 89 So. 2d 799, 813-14 (1956)). The officers have the burden "to show good faith and fairness in the transaction." Cooper v. Mississippi Land Co., 220 So. 2d 302, 309 (Miss. 1969); *see also* Bentz v. Vardaman Mfg. Co., 210 So. 2d 35, 40 (Miss. 1968) (applying rule in case where vice president of second corporation had also been director of first corporation).

[319] ABA Committee on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments Pertaining to Director's Conflicting Interest Transactions*, 43 BUS. LAW. 691, 692 (1988) [hereinafter *Changes*]. The common law rule also provided that the interested director who benefited from the transaction could be required to release any profits and be held responsible for any damages. *Id.*; *see* Holley, *supra* note 18, at 878-79 (noting transition from rule of automatic voidability in interested director transactions to more flexible approach).

the duty. The Court added "[t]his rule does not proscribe all contracts between a director or officer in the corporation. It simply requires that, if such a contract is made, the corporation's interest must be guarded, and it represented, by disinterested agents free from the control or influence of the interested director or officer."[320] Disclosure and informed approval or ratification have since become the central focus of loyalty and fair dealing disputes. Most states today permit a director or officer to enter into transactions with the corporation so long as the director or officer has dealt fairly with the corporation, even without disclosure and ratification. In fact, most states today have some kind of "safe harbor" statute that enacts this view.[321]

The RMBCAAEIMAA contains no articulation of the officer's duty of loyalty.[322] Regarding directors only, the Act contains a carefully crafted subarticle presented in conflict-of-interest terminology.[323] The RMBCAAEIMAA provides

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[320] *Knox Glass Bottle Co.*, 89 So. 2d at 816. *Knox Glass Bottle Co.* concerned a case brought by a corporation to recover substantial profits made by former officers and directors and members of their family, and their friends and business associates, from leases of trucks to the corporation. *Id.*

[321] PRINCIPLES, *supra* note 1, § 5.02, Reporter's Notes 1, 2 & 6, at 235-42. By 1994, forty-five states had codified the view that a transaction between a director and the corporation was not voidable simply because a fiduciary relationship existed between the parties. *Id.* § 5.02, Reporter's Note 1, at 235.

[322] According to the draftsmen, "[c]onflicts of interest of non-director officers or employees of the corporation are dealt with by the law of agency prescribing loyalty of agent to principal. . . . [T]he conflict of interest problems of all corporate personnel except directors can be satisfactorily handled by general law, internal rules, and personnel procedures." *Changes*, *supra* note 319, at 695. The *Principles of Corporate Governance* address a central sphere of the duty of loyalty labeled the duty of fair dealing and impose it upon senior executives, directors and controlling shareholders. PRINCIPLES, *supra* note 1, §§ 5.01-.10.

[323] MISS. CODE ANN. §§ 79-4-8.60 to -8.63 (1996). First, a "conflicting interest" is defined:

> (1) "Conflicting interest" with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) if:
>
> (i) Whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the

> (b) A director's conflicting interest transaction may not be enjoined, set aside or give rise to an award of damages or other sanctions in a proceeding by a shareholder or by or in the right of the corporation because the director, or any person with whom or which he has a personal, economic or other association has an interest in the transaction, if[324]

the majority of disinterested directors or shareholders approve or ratify the transaction "at any time" in accordance with certain statutory procedures,[325] *or* "[t]he transaction, judged according to the circumstances at the time of commitment, is

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> time of commitment that he or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction; or
>
> (ii) The transaction is brought (or is of such character and significance to the corporation that it would in the normal course be brought) before the board of directors of the corporation for action, and the director knows at the time of commitment that any of the following persons is either a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the person that the interest would reasonably be expected to exert an influence on the director's judgment if he were called upon to vote on the transaction: (A) An entity (other than the corporation) of which the director is a director, general partner, agent or employee; (B) a person that controls one or more of the entities specified in subclause (A) or an entity that is controlled by, or is under common control with, one or more of the entities specified in subclause (A); or (C) an individual who is a general partner, principal or employer of the director.

Id. § 79-4-8.60(1). Thereafter, the RMBCAAEIMAA provides:

> (2) "Director's conflicting interest transaction" with respect to a corporation means a transaction effected or proposed to be effected by the corporation (or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest respecting which a director of the corporation has a conflicting interest.

Id. § 79-4-8.60(2).

[324] *Id.* § 79-4-8.61(b).

[325] *Id.* § 79-4-8.61(b)(1)-(2). A director's vote to ratify any such transaction is at all times subject to that director's duty of care and the business judgment rule.

established to have been fair to the corporation."[326] Each of these clauses needs a note. Importantly, the RMBCAAEIMAA provides that action by directors or shareholders to approve an interested transaction may be taken "at any time." The Comment to Section 8.62(a) of the Revised Model Act indicates that this phrase permits approval before or after the transaction. "At any time" means at any time.

The statutory safe harbor is presented in the disjunctive. Objective fairness, if proved, will validate the otherwise offending transaction, though neither shareholder nor disinterested director ratification be forthcoming. There is no reason, on principle or in policy why we should wish to hold a director, if the transaction be objectively fair to the corporation. To be sure, practical problems appear here. Proving at trial the objective fairness "at the time of commitment"—no doubt several years in the past—may be quite a feat when the transaction has turned sour and is being scrutinized through twenty-twenty hindsight lenses. This leads to the more elusive question whether the converse is so—whether shareholder ratification upon full disclosure—procedural fairness, if you will—will insulate a transaction in breach of the duty of loyalty, even though objective substantive fairness to the corporation cannot be shown. The statute says so, and we should take the statute at its word.[327]

Given the prevalent biases in the area, the underlying premises of this state's director's safe harbor need emphasis. "[I]t is important to keep firmly in mind that it *is* a contingent risk we are dealing with—that an interest conflict is not in itself a tort or a crime or injurious to others."[328] The draftsmen go on to remind us it is by no means irrelevant that "the corporation and the shareholders may secure major benefits from a transaction despite the presence of a director's conflicting interest."[329] The statute reflects a sensitivity to this reality and a balancing of competing interests. "[W]hile conflicting interests surely carry potential danger, other important social values—economic efficiency, predictability, and business finality— are also at stake and should be accorded heavy countering weight in the law."[330]

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[326] *Id.* § 79-4-8.61(3). On this and other points, the RMBCAAEIMAA needs to be carefully consulted in deciding whether and to what extent *Knox Glass Bottle Co.* is still good law.

[327] Holmes the Lesser seems to think otherwise. *See* Holmes, *supra* note 19, pt. 1, at 206-10. Holmes believed the statute should be interpreted as a savings provision which retains fairness as the final test of validity, rather than as a procedure for absolute validation. *Id.* at 208.

[328] *Changes*, *supra* note 319, at 693. This must be remembered despite the fact that interest conflicts can, and occasionally do result in harmful acts. *Id.*

The RMBCAAEIMAA director's conflict of interest sections define a "director's conflicting interest transaction"[331] and with respect thereto preempt the field. Unlike the broad and general (and elusive) standards found in the duty of care sections, the legal language unmistakably implies a policy choice to seek certainty of result through a bright-line rule.[332] In the case of transactions by the corporation, a subsidiary or a controlled entity in which the director has a financial interest, no other law may intervene.[333] Section 79-4-8.61(b) makes unmistakably clear that no action lies against a director by reason of his conflicting interest transaction if he has obtained majority approval or ratification of the qualified disinterested directors, or the qualified disinterested shareholders, *or*, if, independent of these, "[t]he transaction, judged according to the circumstances at the time of commitment, [was] . . . fair to the corporation,"[334] provided only that the director's actions in this regard comply with the good faith and due care criteria in Section 8.30(a).[335]

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[329] *Id.* What a breath of fresh air, to hear this said or see it written, given contemporary culture and its view of conflicts of interest!

[330] *Id.* at 694. It should be remembered that men do not always behave selfishly. *Id.* at 693.

[331] See *supra* note 274 and accompanying text.

[332] *Changes*, *supra* note 319, at 692-94. The key objective of the directors conflicting interest sections is to increase predictability and to enhance practical administrability. *Id.* at 692.

[333] This is of prime importance whenever one confronts a court not particularly experienced or learned in the law of corporate governance but with a neo-populist view of the scope and power of fiduciary duties.

[334] MISS. CODE ANN. § 79-4-8.61(b)(3) (1996). "Fairness will only be judged as of the time a transaction is entered into. [The law] does not use phrases such as 'entire fairness,' 'inherent fairness,' or 'intrinsic fairness,' . . . ." PRINCIPLES, *supra* note 1, § 5.02(a)(2)(A) cmt., at 219.

The Reporters for the ALI *Principles* have taken exception to the Revised Model Act on this point, and their view is worth quoting for the light it sheds on the current state of Mississippi law.

> The Model Act bases its bright-line test approach on the need for certainty in the area of conflict-of-interest transactions. The Reporters believe that, in the area of avoidable conflict-of-interest transactions, the desirability of affording certainty to a person with a potentially conflicting interest is outweighed by the desirability of encouraging oversight by directors other than those who have a relationship with the person transacting business with the corporation that is sufficiently substantial that it would reasonably be expected to affect the director's judgment with respect to the transaction in a manner adverse to the corporation.[336]

This "dissent" is instructive in that it leaves no doubt the Mississippi statute means what it appears to mean, *viz.*, that judicial review of conflicting interest transactions in this state is effectively pretermitted where the transaction has been approved by independent directors at any time.

D. The Officer's And Controlling Shareholder's Duty Of Fair Dealing And A Similar Safe Harbor

The *Principles of Corporate Governance* present a broader coverage for the duty of fair dealing and certainly ought to be consulted in cases concerning directors outside the statutorily defined conflicting interest transactions and in all cases of controlling shareholders and officers. Like the RMBCAAEIMAA, Section 5.02 provides generally that the duty is fulfilled with respect to a transaction if there has been appropriate disclosure of both the conflict of interest and the details of the transaction and one of the three conditions attained: ratification by disinterested directors, ratification by disinterested shareholders or "[t]he transaction is fair to the corporation when entered into."[337] The Section 5.02 duty and its safe harbor extend to senior executives and, if it be considered for guidance in this state, note should be taken that its regime of procedural fairness is not identical to that found in the statute.[338] Section 5.10 then addresses conflict of interest

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[335] MISS. CODE ANN. § 79-4-8.30(a) (1996). Again, a director cannot vote to authorize looting the corporate coffers, at least, not with impunity. Any director's vote here is subject to scrutiny under his duty of care and the business judgment rule. *Changes*, *supra* note 319, at 706.

[336] PRINCIPLES, *supra* note 1, § 5.02, Reporters' Note 13, at 244. Section 5.02 of the *Principles of Corporate Governance* requires the challenging party to demonstrate that such disinterested directors "could not reasonably have concluded that a transaction approved by them in advance was fair to the corporation." *Id.* § 5.02 cmt. a, at 211.

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[337] PRINCIPLES, *supra* note 1, § 5.02(a)(2)(A). If the challenging party proves that the requirements of subsections (a)(2)(B), (a)(2)(C), or (a)(2)(D) are not met, the director or senior executive must demonstrate that the transaction was fair to the corporation. *Id.* § 5.02(b).

[338] In its entirety, PRINCIPLES, *supra* note 1, § 5.02 reads:

> § 5.02. Transactions with the Corporation
>
> (a) *General Rule.* A director [§ 1.13] or senior executive [§ 1.33] who enters into a transaction with the corporation (other than a transaction involving the payment of compensation) fulfills the duty of fair dealing with respect to the transaction if:
>
> (1) Disclosure concerning the conflict of interest [§ 1.14(a)] and the transaction [§ 1.14(b)] is made to the corporate decisionmaker [§ 1.11] who authorizes in advance or ratifies the transaction;
>
> and
>
> (2) Either:
>
> (A) The transaction is fair to the corporation when entered into;
>
> (B) The transaction is authorized in advance, following disclosure concerning the conflict of interest and the transaction, by disinterested directors [§ 1.15], or in the case of a senior executive who is not a director by a disinterested superior, who could reasonably have concluded that the transaction was fair to the corporation at the time of such authorization;
>
> (C) The transaction is ratified, following such disclosure, by disinterested directors who could reasonably have concluded that the transaction was fair to the corporation at the time it was entered into, provided (i) a corporate decisionmaker who is not interested [§ 1.23] in the transaction acted for the corporation in the transaction and could reasonably have concluded that the transaction was fair to the corporation; (ii) the interested director or senior executive made disclosure to such decisionmaker pursuant to Subsection (a)(1) to the extent he or she then knew of the material facts; (iii) the interested director or senior ex-

transactions between a controlling shareholder and a corporation and provides a safe harbor if, following disclosure, the transaction is authorized in advance or ratified by the disinterested shareholders and does not constitute a waste of corporate assets or if the transaction is fair to the corporation when entered into.[339]

> ecutive did not act unreasonably in failing to seek advance authorization of the transaction by disinterested directors or a disinterested superior; and (iv) the failure to obtain advance authorization of the transaction by disinterested directors or a disinterested superior did not adversely affect the interests of the corporation in a significant way; or
>
> (D) The transaction is authorized in advance or ratified, following such disclosure, by disinterested shareholders [§1.16], and does not constitute a waste of corporate assets [§ 1.42] at the time of the shareholder action.
>
> (b) *Burden of Proof.* A party who challenges a transaction between a director or senior executive and the corporation has the burden of proof, except that if such party establishes that none of Subsections (a)(2)(B), (a)(2)(C), or (a)(2)(D) is satisfied, the director or senior executive has the burden of proving that the transaction was fair to the corporation.
>
> (c) *Ratification of Disclosure or Nondisclosure.* The disclosure requirements of § 5.02(a)(1) will be deemed to be satisfied if at any time (but no later than a reasonable time after suit is filed challenging the transaction) the transaction is ratified, following such disclosure, by the directors, the shareholders, or the corporate decisionmaker who initially approved the transaction or the decisionmaker's successor.

PRINCIPLES, *supra* note 1, § 5.02.

[339] In its entirety, PRINCIPLES, *supra*, note 1, § 5.10 reads:

> § 5.10. Transactions by a Controlling Shareholder with the Corporation
>
> (a) *General Rule.* A controlling shareholder [§ 1.10] who enters into a transaction with the corporation fulfills the duty of fair dealing to the corporation with respect to the transaction if:
>
> (1) The transaction is fair to the corporation when entered into; or
>
> (2) The transaction is authorized in advance or ratified by disinterested shareholders [§ 1.16], following disclosure concerning the conflict of interest [§ 1.14(a)] and the transaction [§ 1.14(b)], and does not constitute a waste of corporate assets [§ 1.42] at the time of the shareholder action.
>
> (b) *Burden of Proof.* If the transaction was authorized in advance by disinterested directors [§ 1.15], or authorized in advance or ratified by disinterested shareholders, following such disclosure, the party challenging the transaction has the burden of proof. The party challenging the transaction also has the burden of proof if the transaction was ratified by disinterested directors and the failure to obtain advance authorization

The ALI *Principles* present another point of note regarding the burden of proof. The party attacking a transaction defended on grounds of disinterested directors' or shareholders' approval has the burden of production and persuasion.[340] However, where there has been a failure of such directors' or shareholders' approval and fairness to the corporation becomes the outcome determinative issue, the director or senior executive has the burden of proving fairness.[341] A similar but appropriately modified regime applies in litigation regarding transactions with a controlling shareholder of the corporation.[342]

> did not adversely affect the interests of the corporation in a significant way. If the transaction was not so authorized or ratified, the controlling shareholder has the burden of proof, except to the extent otherwise provided in Subsection (c).
>
> (c) *Transactions in the Ordinary Course of Business.* In the case of a transaction between a controlling shareholder and the corporation that was in the ordinary course of the corporation's business, a party who challenges the transaction has the burden of coming forward with evidence that the transaction was unfair, whether or not the transaction was authorized in advance or ratified by disinterested directors or disinterested shareholders.

PRINCIPLES, *supra* note 1, § 5.10.

[340] This is one point where our duty of loyalty corporate governance rules may differ from general fiduciary relationship law in Mississippi. *See In re* Will of Fankboner, 638 So. 2d 493, 495 (Miss. 1994) (discussing fiduciary relationship in context of undue influence grounds for will contests); Smith v. Smith, 574 So. 2d 664, 667 (Miss. 1990) (examining fiduciary relationship between grantor and grantee in transaction of inter vivos gifts); Mullins v. Ratcliff, 515 So. 2d 1183, 1192-96 (Miss. 1987) (addressing issue of fiduciary relationship in accordance with execution of deed); Hendricks v. James, 421 So. 2d 1031, 1045 (Miss. 1982) (examining fiduciary relationship in context of deed and bill of sale to beneficiaries from deceased).

[341] PRINCIPLES, *supra* note 1, § 5.02(b). *Compare supra* notes 265-67, and accompanying text.

[342] PRINCIPLES, *supra* note 1, § 5.10(b). If such a transaction is not authorized or ratified by disinterested directors or disinterested shareholders, the controlling shareholder has the burden of proof, except that the challenging party has the burden of producing evidence that the transaction was unfair. *Id.* § 5.10(c).

E. Compensation of Directors and Officers

One special form of a conflicting interest transaction with the corporation is the salary paid to a director. Common sense makes clear that the salary arrangement is subject to scrutiny under the duty of loyalty or fair dealing. Although nothing in Mississippi law per se addresses the point, it should be beyond dispute that a director's compensation agreement is a conflicting interest transaction within Section 79-4-8.60(2).

Officers' compensation is a more serious subject, and here we note *Principles*, § 5.03 provides, not unlike the case of interested transactions generally, that a senior executive "who receives compensation from the corporation for services in that capacity" satisfies his duty of fair dealing if the salary is fair to the corporation when approved or is authorized by disinterested directors or by disinterested shareholders.[343] Nevertheless,

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[343] *Id.* § 5.03(a). As with the general rule for director or senior executive transactions with a corporation, the compensation rule is a bit more complex than noted above. In its entirety, Section 5.03 reads:

> § 5.03 Compensation of Directors and Senior Executives
>
> (a) *General Rule.* A director [§ 1.13] or senior executive [§ 1.33] who receives compensation from the corporation for services in that capacity fulfills the duty of fair dealing with respect to the compensation if either:
>
> (1) The compensation is fair to the corporation when approved;
>
> (2) The compensation is authorized in advance by disinterested directors [§ 1.15] or, in the case of a senior executive who is not a director, authorized in advance by a disinterested superior, in a manner that satisfies the standards of the business judgment rule [§ 4.01(c)];
>
> (3) The compensation is ratified by disinterested directors [§ 1.15] who satisfy the requirements of the business judgment rule [§ 4.01(c)], provided (i) a corporate decisionmaker who was not interested [§ 1.23] in receipt of the compensation acted for the corporation in determining the compensation and satisfied the requirements of the business judgment rule; (ii) the interested director or senior executive did not act unreasonably in failing to seek advance authorization of the compensation by disinterested directors or a disinterested superior; and (iii) the failure to obtain advance authorization of the compensation by disinterested directors or a disinterested superior did not adversely affect the interests of the corporation in a significant way; or

the driving policy of the law is that a corporation should have discretion and authority "to award liberal or novel forms of compensation to attract or retain valued executives."[344] Stock options are common and attractive forms of senior executive compensation plans, as they enhance the executive's incentive that the business of the corporation grow and prosper. As with other conflicting interest transactions, senior executive compensation plans are protected if at the time entered they are judged to have been fair to the corporation.[345] As before, senior executive compensation plans may be ratified at any time by disinterested directors, subject to each director's duty of care and the business judgment rule.[346] By way of illustration, the

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> (4) The compensation is authorized in advance or ratified by disinterested shareholders [§ 1.16], and does not constitute a waste of corporate assets [§ 1.42] at the time of the shareholder action.
>
> (b) *Burden of Proof.* A party who challenges a transaction involving the payment of compensation to a director or senior executive has the burden of proof, except that if such party establishes that the requirements of neither Subsections (a)(2), (a)(3), nor (a)(4) are met, the director or the senior executive has the burden of proving that the transaction was fair to the corporation.

Id. § 5.03.

[344] *Id.* § 5.03 cmt. e, at 249. This policy applies when the board, using its business judgment, decides that a particular form of compensation is in the best interests of the corporation. *Id.*

[345] *Id.* § 5.03(a)(1). According to *Principles* Commentary,

> the circumstances in which a particular corporation finds itself may also warrant providing incentives such as stock options at levels higher than might otherwise be viewed as appropriate. For example, a corporation that is in failing financial condition, or that is just starting in business, may conclude that it is necessary to grant significantly larger inducements to retain or attract valued executives than would be the case if the business were well established and prospering. The fact that the business ultimately does prosper, and the executive is thereby liberally rewarded, should not warrant a court concluding, with the advantage of hindsight, that the compensation arrangement entered into was impermissibly generous.

Id. § 5.03 cmt. e, at 249.

[346] Grimes v. Donald, 673 A.2d 1207, 1219 (Del. 1996); PRINCIPLES, *supra* note 1, § 5.03(a)(3). Ratification under § 5.03(a)(3) provides a mechanism for rectifying mechanical or technical errors which can occur with complex forms of compensation arrangements, such as those concerning stock options. PRINCIPLES, *supra* note 1, § 5.03, cmt. e.

Principles Reporters identify an executive compensation plan that satisfies the standards of the business judgment rule, to-wit:

> Corporation's disinterested directors, after appropriately informing themselves, adopt a phantom stock plan pursuant to which senior executives are awarded units equivalent to one thousand shares each of the corporation's common stock, and at the end of a specified period the executives are paid cash equal to the amount by which the units have appreciated in value.[347]

On the other hand, a plan which would tie incentive increases in senior executive compensation to the Dow Jones Average would fail because no director could rationally believe that such a plan could function as an effective incentive to produce benefits for the corporation.[348]

F. Loans to Management

Prior to 1988, corporate loans to directors or officers were absolutely prohibited.[349] The Revised Model Act once contained an express provision addressing the subject of loans to management. Section 8.32 once allowed loans to directors upon approval of the majority of the disinterested shareholders or upon board determination that the loan benefits the corporation. However, when the legislature enacted the RMBCAAEIMAA, it deleted Section 8.32. This action, coupled with the repeal of former Section 79-3-89, leaves loans to management subject to the general rules on the duty of loyalty and director's conflicting interest transactions, that is, such loans are legally permissible if the general rules are adhered to.

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[347] PRINCIPLES, *supra* note 1, § 5.03 cmt. h, illus. 2, at 251.

[348] *Id.* § 5.03 cmt. h, illus. 1, at 251. A plan which tied a senior executive's base salary "to increases based on changes in a specified government cost-of-living index" would pass muster, albeit the incentives would not ordinarily be considered nearly so great as the phantom stock plan noted above. *Id.* § 5.03 cmt. h, illus. 3, at 251. A disinterested director may rationally believe that a senior executive may find it attractive to have his salary tied to the cost of living index.

[349] MISS. CODE ANN. § 79-3-89 (1996). That prohibition has now been repealed. 1987 Miss. Laws 486. Worthwhile commentary and criticism of the now defunct prohibition appears in Hodge & Perry, *supra* note 18, at 390-92.

As explained above, Sections 79-4-8.60 through -8.63 preempt the field with regard to director's conflicting interest transactions. As a practical matter, any corporate loan made to management by a Mississippi corporation is likely to be made to one who is a director. Should the borrower be a senior executive or merely a shareholder, resort to the *Principles of Corporate Governance*, § 5.02 and § 5.10 seems the appropriate course.

G. Improper Use of Corporation Position, Property or Information

One perennial problem within the scope of the duty of loyalty is the director's or officer's tendency to succumb to temptation and use his corporate position, corporate property or material non-public corporate information to advance his private pecuniary interests. No Mississippi case expressly addresses the point, nor does the RMBCAAEIMAA. The *Principles of Corporate Governance*, however, provide useful guidelines in Section 5.04, enjoining that a director or senior executive may not use the property of the company, confidential corporate information or his position to secure a personal pecuniary benefit unless value is given and he otherwise complies with the general conditions for satisfying the duty of loyalty.[350] A similar rule obtains in the case of a controlling shareholder.[351]

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[350] PRINCIPLES, *supra* note 1, § 5.04(a). Section 5.04 in its entirety reads:

> § 5.04 Use by a Director or Senior Executive of Corporate Property, Material Non-Public Corporate Information, or Corporate Position
>
> (a) *General Rule*. A director [§ 1.13] or senior executive [§ 1.33] may not use corporate property, material non-public corporate information, or his corporate position to secure a pecuniary benefit, unless either:
>
> (1) Value is given for use and the transaction meets the standards of § 5.02 (Transactions with the Corporation);
>
> (2) The use constitutes compensation and meets the standards of § 5.03 (Compensation of Directors and Senior Executives);
>
> (3) The use is solely of corporation information, and is not in connection with trading of the corporation's securities, is not a use of proprietary information of the corporation, and does not harm

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> the corporation;
>
> (4) The use is subject neither to § 5.02 nor § 5.03 but is authorized in advance or ratified by disinterested directors [§ 1.15] or disinterested shareholders [§ 1.16], and meets the requirements and standards of disclosure and review set forth in § 5.02 as if that Section were applicable to the use; or
>
> (5) The benefit is received as a shareholder and is made proportionately available to all other similarly situated shareholders, and the use is not otherwise unlawful.
>
> (b) *Burden of Proof.* A party who challenges the conduct of a director or senior executive under Subsection (a) has the burden of proof, except that if value was given for the benefit, the burden of proving whether the value was fair should be allocated as provided in § 5.02 in the case of a transaction with the corporation.
>
> (c) *Special Rule on Remedies.* A director or senior executive is subject to liability under this Section only to the extent of any improper benefit received and retained, except to the extent that any foreseeable harm caused by the conduct of the director or senior executive exceeds the value of the benefit received, and multiple liability based on receipt of the same benefit is not to be imposed.

Id. § 5.04.

[351] *Id.* § 5.11. Section 5.11 reads:

> § 5.11 Use by a Controlling Shareholder of Corporate Property, its Material Non-Public Corporate Information, or Corporate Position
>
> (a) *General Rule.* A controlling shareholder may not use corporate property, its controlling position, or (when trading in the corporation's securities) material non-public corporate information to secure a pecuniary benefit, unless:
>
> (1) Value is given for the use and the transaction meets the standards of § 5.10 (Transactions by a Controlling Shareholder with the Corporation), or
>
> (2) Any resulting benefit to the controlling shareholder either is made proportionally available to the other similarly situated shareholders or is derived only from the use of controlling position and is not unfair to other shareholders, and the use is not otherwise unlawful.
>
> (b) *Burden of Proof.* A party who challenges the conduct of a controlling shareholder under Subsection (a) has the burden of proof, except that if value was given for the benefit, the burden of proving whether the value was fair should be determined as provided in § 5.10 in the case of a transaction with the corporation.
>
> (c) *Special Rule on Remedies.* A controlling shareholder is subject to liability under this section only to the extent of any improper benefit received and retained, except to the extent that any foreseeable harm caused by the shareholder's conduct exceeds the value of the benefit received, and multiple liability based on receipt of the same benefit is not

H. Corporate Opportunity

One important branch of the duty of loyalty, or of fair dealing, whatever one chooses to call it, concerns the conduct of directors or officers when confronted with what in fairness and good conscience should be considered a corporate opportunity. Well settled Mississippi law has long held a director or officer so usurping a business opportunity that ought be the corporation's may be called to account and ordered to disgorge his profits. Nothing in the RMBCAAEIMAA disturbs this view.[352] Yet it is equally clear that a director or officer is not by virtue of his service precluded from any other economic activity, and, because of this, it becomes important to gain a grasp of just what a corporate opportunity is.

For better or for worse, the Mississippi cases afford no bright line rule, nor does the law of any other state. In *Ellzey v. Fyr-Pruf, Inc.*,[353] the Mississippi Supreme Court quoted at length from *Miller v. Miller*, remarking that the Minnesota Supreme Court had "established an eclectic test for determining whether a business opportunity is a corporate one."[354] Summarizing, the *Ellzey* court derived from the Minnesota Supreme Court a two-prong test, in which "[t]he first asks whether the complainant has shown the business opportunity to be reasonably related to the existing or prospective business activities of the corporation. The second asks whether the [complainant] has shown the financial ability of the corporation to seize the opportunity."[355] Fleshing out the financial ability

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to be imposed.

Id.

[352] MISS. CODE ANN. § 79-4-8.60 (1996). Usurping a corporate opportunity is not a "transaction" by or with the corporation. *Changes*, *supra* note 319, at 694.

[353] 376 So. 2d 1328 (Miss. 1979).

[354] *Ellzey*, 376 So. 2d at 1332 (citing Miller v. Miller, 222 N.W.2d 71, 81 (Minn. 1994)). The *Miller* court's approach has been criticized as adding "only a new layer of confusion to an already murky area of the law, without forwarding the analysis in any significant fashion." *See* Victor Brundy & Robert C. Clark, *A New Look At Corporate Opportunities*, 94 HARV. L. REV. 998, 999 n.2 (1981).

[355] *Ellzey*, 376 So. 2d at 1333. The *Ellzey* court stated that the first part of the test is essential to a corporation's prima facie case. *Id.* However, the court noted that the financial ability part of the test presented a more "troublesome"

standard, the *Ellzey* court added that "the complainant must prove that the corporation was either (a) not insolvent in the balance sheet sense at the relevant times, or (b) financially disabled as a result of nonpayment of a debt or breach of a fiduciary duty by one or more of the [directors and officers]."[356]

Aqua-Culture Technologies, Ltd. v. Holly[357] reaffirmed and gave meaning to the second part of the financial ability standard, holding that defendant directors and officers "may not cause [the corporation] serious financial hardships through their breach of fiduciary duties and then use that same financial hardship to argue . . . [financial disability]."[358]

The supreme court in *Hill v. Southeastern Floor Covering Co.*[359] resorted to its once prevalent practice of making law by copying it in the form of lengthy quotations from Corpus Juris Secundum.[360] In particular, the court quoted:

> If there is presented to a corporate director or officer a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and if embracing the opportunity will bring the self-interest of the director or officer into conflict with that of the corporation, the director or officer may not seize the opportunity for himself.[361]

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question. *Id.*

[356] *Id.* at 1335. In applying the test, the court held that the complainant had established this element. *Id.*

[357] 677 So. 2d 171 (Miss. 1996).

[358] *Aqua-Culture Techs.*, 677 So. 2d at 183 (citing *Ellzey*, 376 So. 2d at 1335). The *Aqua-Culture Techs.* court reasoned that directors and officers should not be able to argue lack of financial ability to take advantage of corporate opportunities when they, in fact, caused the insolvency. *Id.*

[359] 596 So. 2d 874 (Miss. 1992).

[360] The principal problem with this practice, of course, has always been that most legal propositions advanced in C.J.S. are contradicted in the next paragraph, if not the next sentence, rendering the familiar big blue legal encyclopedia the foremost exemplar of Wade's constant: for every rule of law there is an equal and opposite rule of law, or, more commonly, if you look long enough, you can find a case that says most anything.

[361] *Hill*, 596 So. 2d at 877 (quoting 19 C.J.S. *Corporations* § 513 (1990)). In

The court went on to discuss *Ellzey v. Fyr-Pruf* and noted that *Ellzey* had relied on the Minnesota view.[362] The court emphasized one factor to be considered in determining whether the opportunity is in line with the corporation's business is "whether or not the opportunity embraces areas adaptable to the corporation's business and into which it might easily, naturally, or logically expand."[363]

Derouen v. Murray[364] noted that the doctrine of corporate opportunity had been given "flesh" in *Ellzey* and *Hill* and added yet another contribution to the articulation of the rule.[365] Quoting from the *Principles of Corporate Governance*, the *Derouen* court said

> [o]ne type of opportunity within this sub-species of the duty [of fair dealing] is
>
> > (1) any opportunity to engage in a business activity of which a director or senior executive becomes aware . . . of

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Hill, the general manager of a floor covering company submitted a bid for asbestos encapsulation, ceramic tile, ceiling, carpet, and vinyl tile. *Id.* at 875. The company, however, had to withdraw the asbestos bid, and the general manager independently contacted the company's asbestos subcontractor about doing the job. *Id.* When the manager told the company, the company brought suit, alleging that he should have bid the project for the company, not himself. *Id.* at 876. On appeal, the court affirmed the chancellor's decision that the manager breached his fiduciary duty to the company. *Id.* at 878.

[362] *Id.* at 878. The *Ellzey* court adopted the first portion of the test established by the Minnesota Supreme Court in *Miller*. *Ellzey*, 376 So. 2d at 1333. However, the *Ellzey* court declined to wholly accept the second part of the *Miller* test. *Id.* at 1333-34; *see supra* note 354 and accompanying text.

[363] *Hill*, 596 So. 2d at 878 (quoting C.J.S. *Corporations* § 513(d) (1990)); *see also Ellzey*, 376 So. 2d at 1333 (quoting Miller v. Miller, 222 N.W.2d 71, 81 (Minn. 1974)). The *Hill* court listed several additional factors to be considered in determining whether or not the opportunity is in line with the corporation's business. *Hill*, 596 So. 2d at 878.

[364] 604 So. 2d 1086 (Miss. 1992).

[365] *Derouen*, 604 So. 2d at 1092. In *Derouen*, a shareholder brought an action against his co-shareholder who, after the sale of the corporation's principal business operations, formed a new corporation which acquired the first corporation's assets. *Id.* at 1088. The action was initiated personally against the individual and derivitively on behalf of the original corporation. *Id.*

> (B) through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation.[366]

Without doubt it is desirable that corporate directors and officers be given rules to live by that are clear and understandable and easily applied. Against the contention that the foregoing fall far short of this consummation and are but vague generalities, we think the director and officer who understands the level of loyalty he owes his corporation and who reads or is advised of *Ellzey*, *Aqua-Culture Technologies*, *Hill* and *Derouen* should have little or no trouble knowing when a business opportunity that comes his way is one he must offer his corporation.[367] In *Ellzey*, the directors and officers of Fyr-Pruf, Inc.

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[366] *Id.* (quoting PRINCIPLES, *supra* note 1, § 5.05(b)(1)(B)). The *Principles'* complete definition of a corporate opportunity is as follows:

> (b) *Definition of a Corporate Opportunity.* For purposes of this Section, a corporate opportunity means:
>
> (1) Any opportunity to engage in a business activity of which a director or senior executive becomes aware, either:
>
> (A) In connection with the performance of functions as a director or senior executive, or under circumstances that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation; or
>
> (B) Through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation; or
>
> (2) Any opportunity to engage in a business activity of which a senior executive becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage.

PRINCIPLES, *supra* note 1, § 5.05(b).

[367] We have thought enough about the appropriate form of expressing various rules of law to have long ago learned that generally worded rules may well deter some conduct we may not otherwise wish to punish. I accept generality of expression in the present context, and without hesitation, because we want it to 'chill' behavior on the borderline of substantive obnoxiousness." Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695-96 (1976).

had negotiated for the purchase of equipment needed for the corporation's carpet padding manufacturing operation and then formed a separate rival corporation which bought the equipment.[368] *Aqua-Culture Technologies* is quite similar. International Mari-Culture Technologies, Ltd. (IMT) was organized to market catfish farming technology in West African nations.[369] IMT "secured a contract with Zaire to develop five catfish farms, including all ancillary supplies and equipment."[370] IMT encountered financial difficulties. Several IMT directors, without the knowledge of other directors or IMT shareholders, organized a new corporation, Aqua-Culture, which when discovered "was carrying forward IMT's concept of developing catfish farming technology in Africa."[371] One of Aqua-Culture's organizers had held IMT's purse strings and through a series of financial indiscretions and coverups had left IMT broke.[372]

In *Hill*, the general manager of a floor covering and ceiling subcontractor worked up for his company a bid for asbestos encapsulation, ceramic tile, ceiling, carpet and vinyl tile work,[373] but when complications arose (which were as a practical matter surmountable), Hill submitted a bid himself and obtained the subcontract and profited to the tune of $90,000.00 without telling his corporate employer of any of this.[374] In

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[368] *Ellzey*, 376 So. 2d at 1331. After Fyr-Pruf lost its lease and the Small Business Administration rejected its loan application, some of the officers and directors acquired a new facility under a new corporate charter. *Id.* at 1330-31.

[369] *Aqua-Culture Techs.*, 677 So. 2d at 173. Summers, an original IMT shareholder, was responsible for marketing IMT to African nations. *Id.*

[370] *Id.* at 179. About a month after securing the Zaire contract, Summers sent a report to IMT shareholders describing the contract and stating that he was returning to Africa to obtain further commitments. *Id.*

[371] *Id.* at 181. Original IMT shareholders were offered interests in Aqua-Culture. *Id.* at 180-81. Holly, one of the offerees, became interested in what Summers was doing and purchased $275 worth of Aqua-Culture stock. *Id.* at 181.

[372] *Id.* at 179-80. The evidence showed that Summers had withdrawn $78,433.08 for things not related to IMT's business. *Id.* at 180.

[373] *Hill*, 596 So. 2d at 875. Hill, the general manager of Southeastern, submitted a bid on behalf of Southeastern with Cheta Construction. *Id.*

[374] *Id.* at 875. Southeastern had to withdraw the asbestos encapsulation bid because it was not licensed to do asbestos work. *Id.* Subsequently, Hill independently contacted Southern Interiors, Southeastern's asbestos subcontractor, about doing the job. *Id.* The Mississippi Supreme Court held that there was substantial

Derouen, the director/officer's corporation had sold its assets to another as a part of the sale of a going concern business and when the director/officer learned later that the purchaser wanted to get out of the business, he did not advise his corporation or particularly his fifty percent (50%) co-shareholder,[375] but instead and unbeknownst to anyone, formed a new corporation entirely and acquired the business.[376]

To be sure, the facts of *Ellzey*, *Aqua-Culture Technologies*, *Hill* and *Derouen* are a bit more complicated than as recited, but this is their essence. What is important is that, whatever articulation of the rule and the factors to be considered one might accept, it is beyond reasonable dispute that in each of these three cases directors/officers seized corporate opportunities, and in doing so breached their duty of loyalty and fair dealing owed their corporate principals.

Section 5.05 of the *Principles of Corporate Governance* contains an important elaboration of the corporate opportunity rule, together with careful commentary, a number of graphic illustrations and a Reporter's Note providing further citations and resources. Worth quoting here is the general rule of Section 5.05(a), which articulates the limited circumstances and procedures by which a director or senior executive may take advantage of a corporate opportunity. *Principles* section 5.05(a) provides:

> (a) *General Rule.* A director [§ 1.13] or senior executive [§ 1.33] may not take advantage of a corporate opportunity unless:
>
> (1) The director or senior executive first offers the corporate opportunity to the corporation and makes dis-

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evidence to support the chancellor's finding that Hill breached his fiduciary duty to Southeastern. *Id.* at 878.

[375] *Derouen*, 605 So. 2d at 1088. One of the original co-shareholders had gone to work for the new owner and essentially ran the business. *Id.*

[376] *Id.* When the purchaser experienced financial difficulty, the other original co-shareholder formed a new corporation and reacquired the business. *Id.* at 1089. On appeal, the Mississippi Supreme Court stated that he was free to engage in other business transactions, so long as such engagements were not inconsistent with his prior duties to the original corporation. *Id.* at 1092.

> closure concerning the conflict of interest [§ 1.14(a)] and the corporate opportunity [§ 1.14(b)];
> (2) The corporate opportunity is rejected by the corporation; and
> (3) Either
> (A) The rejection of the opportunity is fair to the corporation;
> (B) The opportunity is rejected in advance, following such disclosure, by disinterested directors [§ 1.15], or, in the case of a senior executive who is not a director, by a disinterested superior, in a manner that satisfies the standards of the business judgment rule [§ 4.01(c)]; or
> (C) The rejection is authorized in advance or ratified, following such disclosure, by disinterested shareholders [§ 1.16], and the rejection is not equivalent to a waste of corporate assets [§ 1.42].[377]

A similar rule obtains in the case of a controlling shareholder presented with a corporate opportunity.[378]

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[377] PRINCIPLES, *supra* note 1, § 5.05(a).

[378] Section 5.12 of *Principles* provides:

> § 5.12 Taking of Corporate Opportunities by a Controlling Shareholder
>
> (a) *General Rule.* A controlling shareholder [§ 1.10] may not take advantage of a corporate opportunity unless:
>
> (1) The taking of the opportunity is fair to the corporation; or
>
> (2) The taking of the opportunity is authorized in advance or ratified by disinterested shareholders [§ 1.16], following disclosure concerning the conflict of interest [§ 1.14(a)] and the corporate opportunity [§ 1.14(b)], and the taking of the opportunity is not equivalent to a waste of corporate assets [§ 1.42].
>
> (b) *Definition of a Corporate Opportunity.* For purposes of this Section, a corporate opportunity means any opportunity to engage in a business activity that:
>
> (1) Is developed or received by the corporation, or comes to the controlling shareholder primarily by virtue of its relationship to the corporation; or
>
> (2) Is held out to shareholders of the corporation by the controlling shareholder, or by the corporation with the consent of the controlling shareholder, as being a type of business activity that will be within the scope of the business in which the corporation is engaged or expects to engage and will not be within the scope of the controlling shareholder's

I. Competition With Corporation

A perennially troublesome question is the extent to which a director or officer may become involved in a business that competes with the corporation to which he owes his duty of loyalty or fair dealing. No Mississippi statute or case law addresses the point. The *Principles of Corporate Governance* adopts a middle ground and permits a director or senior executive to compete if:

> (1) any reasonably foreseeable harm to the corporation from such competition is outweighed by the benefit the corporation may reasonably be expected to derive from allowing the competition to take place, or there is no reasonably foreseeable harm to the corporation from such competition (2) the competition is authorized in advance or ratified, following disclosure concerning the conflict of interest and the competition, by disinterested directors (or, in the case of a senior executive who is not a director, authorized in advance by a disinterested superior), in a manner that satisfies the standard of the business judgment rule, or (3) disinterested shareholders authorize in advance or ratify such competition, following disclosure concerning the conflict of interest and the competition, and the shareholders' action is not equivalent to a waste of corporate assets.[379]

> business.
>
> (c) *Burden of Proof.* A party who challenges the taking of a corporate opportunity has the burden of proof, except that the controlling shareholder has the burden of proving that the taking of the opportunity is fair to the corporation if the taking of the opportunity was not authorized in advance or ratified by disinterested directors or by disinterested shareholders, following the disclosure required by Subsection (a)(2).

Id. § 5.12.

[379] *Id.* § 5.06 cmt. a, at 301-02. Addressing the third possibility, the comment explains that a determination of whether a shareholders' action is equivalent to a waste of corporate assets involves: balancing the benefits received by the corporation against any detriment suffered. *Id.* at 302.

IX. A NOTE ON SHAREHOLDERS, DIRECTORS AND OFFICERS TRADING INSIDE THE CLOSE CORPORATION

A brief word need be added on a familiar scenario, one not directly a part of the law of corporate governance, properly so-called, but affiliated in fact in the minds of many Mississippians. Controlling shareholders, directors, and senior executives often deal with minority shareholders regarding their interest in the company. After the fact, the minority shareholder often has second thoughts. The question becomes whether the interested shareholder, director, or executive has impermissibly used material non-public corporate information to secure a pecuniary benefit.

The question in the present context is whether the shareholder, director or senior executive has breached a duty owed to the corporation. The conventional view is, no. Recovery has been denied the corporation in cases involving the use of inside information in the purchase or sale of securities on the premise that the corporation itself has not been damaged.[380] On the other hand, in some cases there may be a breach of the duty of fair dealing to the corporation. These cases arise when it appears that misappropriation of a corporate asset has harmed the corporation and damaged its reputation.[381] The corporation may also recover for unjust enrichment and for any actual harm it may suffer "as a result of the unauthorized use of material inside information."[382] On the other hand, *Principles* states that "section 5.04 does not authorize the corporation to seek damages on behalf of shareholders who may have a claim based on harm suffered by them."[383]

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[380] Freeman v. Decio, 584 F.2d 186, 196 (7th Cir. 1978). The court held that under Indiana law, corporate directors and officers may not bring a derivative suit to recover profits from alleged insider trading. *Freeman*, 584 F.2d at 196.

[381] PRINCIPLES, *supra* note 1, § 5.04 cmt. d(2)(a). The theory behind section 5.04(a) is that the director or senior executive used corporate information to secure a personal pecuniary benefit. *Id.* at 269.

[382] *Id.* at 270. In an oft-cited case, the Court of Appeals of New York permitted the corporation to recover for unjust enrichment, although the corporation had not alleged any actual damage. Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969).

[383] PRINCIPLES, *supra* note 1, § 5.04 cmt. d(2)(a), at 270. Additionally, if the

These thoughts well in mind, we turn to the general rule in Mississippi that no person:

> in connection with the offer, sale or purchase or any security, directly or indirectly, . . . [may] make any untrue statement of a material fact or . . . omit to state a material fact necessary in order that the statements made, in the light of the circumstances under which they are made, not misleading.[384]

This section essentially mirrors Rule 10b-5. The statute states a general standard that is clear enough, though there is no Mississippi case law construing or enforcing the duty it imposes.

There is a federal case that should be noted. In *Johnston v. Wilbourn*,[385] the Court blended Rule 10b-5 [and, by inference, Section 75-71-501(2)] and *Fought v. Morris* in the context of a claim analogous to that just posited.

In *Johnston*, the plaintiffs were minority shareholders in the Stonewall Bank. They sold their shares for $1100.00 per share to two individuals who collectively held a majority of the shares in the bank.[386] The buyers were also directors and officers of the bank. Immediately after the sale of the shares, these inside/controlling interest/directors/officers used their interest in another and much larger bank, Citizens National Bank, to effect a merger of the Stonewall Bank with Citizens National.[387] The plaintiffs claimed that the selling price was

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primary right to recovery lies with the shareholders, and the shareholders recovered, the corporation would not also be entitled to recover on a theory of unjust enrichment. *Id.*

[384] MISS. CODE ANN. § 75-71-501 (1996). Like Rule 10b-5, section 75-71-501 of the Mississippi Code contains an implicit requirement of reasonable reliance. Geisenberger v. John Hancock Distrib., Inc., 774 F. Supp. 1045, 1051 (S.D. Miss. 1991).

[385] 760 F. Supp. 578 (S.D. Miss. 1991).

[386] *Johnston*, 760 F. Supp. at 581. McDonnell, Sr. and Wilbourn, minority shareholders and directors of Citizens National Bank, collectively purchased 52 percent of the common stock of Stonewall Bank. *Id.* at 579. After Stonewall began experiencing financial difficulty, McDonnell, Sr. and Wilbourn sought to purchase all the shares of Stonewall stock. *Id.* at 580-81.

[387] *Id.* at 579. All of the defendants were members of the board of directors of Stonewall Bank. *Id.* Additionally, McDonnell, Sr. was president of Stonewall

grossly inadequate and that they would never have accepted it had they known of the proposed merger.[388] The essence of the charge in the complaint was that the law burdened the buying insiders with duties of loyalty, good faith and fair dealing, that the buyer Defendants owed these duties directly to Plaintiffs, and that Defendants breached these duties by failing to disclose, prior to Defendants' purchase of Plaintiffs' shares, Defendants' plans to propose and effect a merger of Stonewall Bank and Citizens National Bank.[389] In addressing Plaintiffs' federal claims on Defendants' motion for summary judgment, the Court wrote that the "defendants' duty was to disclose material facts which were known to them by virtue of their positions, but which were not known to plaintiffs and which, if known by plaintiffs, would have affected their judgment in the transaction."[390] The question to be asked in deciding whether there is a duty to disclose is whether there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to [act]."[391] Of importance, the *Johnston* court noted that materiality and the duty to disclose did not turn on whether there was a formal agreement to merge or, as here, whether a formal decision had been made to go public.[392] The duty to disclose extends to that information

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Bank. *Id.* at 579-80.

[388] *Id.* at 582. At the time of the merger, McDonnell, Sr. was president of Citizens National Bank, and Wilbourn acted as the bank's legal counsel. *Id.* at 579-80.

[389] *Id.* at 585. The plaintiffs contended that even if the defendants did not have the authority or power to effect the merger, the special circumstances established a duty to disclose any preliminary merger discussions. *Id.*

[390] *Id.* at 583 (citing Chiarella v. United States, 445 U.S. 222, 227 (1979)). Specifically, the plaintiffs claimed that the defendants violated section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1994), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1996), which disallows any fraudulent activity connected with the purchase or sale of securities. *Id.*

[391] *Johnston*, 760 F. Supp. at 583 (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)).

[392] *Id.* at 583-84. The court stated that "[w]hether merger discussions in any particular case are material. . . depends on the facts." *Id.* at 583 (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 239 (1988)). In *Basic*, the United States Supreme Court noted that examples of material merger discussions may include "board resolutions, instructions to investment bankers, and actual negotiations between

which a reasonably prudent shareholder would want to know before deciding whether to sell his shares.[393] The discussion in the *Johnston* case takes place in the context of the court's consideration of the Rule 10b-5 claim. Two factors in that discussion are worthy of note. First is the fact that Section 75-71-501 is essentially a mirror image of Rule 10b-5. Second, not only does the District Court weave the basic principles of *Fought v. Morris* into its analysis, the Court had before it as well state law claims, and, albeit in far more abbreviated form, recognized that the same standards applied to state law claims.[394]

In *Johnston*, the Court dismissed the corporation itself, holding that the corporation owes no fiduciary duty to its shareholders, nor can it be held vicariously liable for the breaches of its officers and directors.[395] Where, however, the defendant directors caused the corporation to purchase plaintiff's shares, the corporation is a proper defendant.

Fortenberry v. Foxworth Corp.[396] lies also in the field. On September 7, 1984, Foxworth Corporation, per Thomas (Arny) Rhoden, an officer, director and shareholder, purchased the shares Frank Adams Fortenberry held in the corporation for consideration of $2,000.00 per month for the remainder of Fortenberry's life.[397] At the time, Fortenberry was suffering

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principals or their intermediaries." Basic, Inc. v. Levinson, 485 U.S. 224, 239 (1988).

[393] *Johnston*, 760 F. Supp. at 583. The court concluded that this case presented a question of fact as to the issue, and thus denied the defendants' motion for summary judgment. *Id.*

[394] *Id.* at 589-90. Technically, *Johnston* merely denied defense motions for summary judgment. There is no further reported decision. At trial on the merits, the jury found for Defendants. The case was submitted to the jury on instructions mirroring the legal principles described above. I have talked to one of the lawyers in the case who advises the explanation for the jury's verdict is that Plaintiffs failed to prove $1100 per share was not fair value in any event.

[395] *Id.* at 590. Although the court denied the individual defendants' motions for summary judgment, both Citizens National Bank and Stonewall Bank were awarded motions for summary judgment. *Id.*

[396] 825 F. Supp. 1265 (S.D. Miss. 1993).

[397] *Fortenberry*, 825 F. Supp. at 1269. The plaintiff claimed that the value of the stock was at least $300,000, and accordingly, the consideration paid by the

from Alzheimer's disease.[398] On June 6, 1990, Floyce L. Fortenberry, as conservator of Frank Adams Fortenberry, filed suit, charging that Rhoden had exploited his friendship with the mentally debilitated Frank Adams Fortenberry and had concealed material facts which Rhoden had a duty to disclose prior to the corporation's purchasing the Fortenberry shares.[399] Plaintiff claimed federal securities violations and also sued under the Mississippi Securities Act, § 75-71-501 of the Mississippi Code, common law fraud, breach of fiduciary duties and intentional infliction of emotional distress.[400] The District Court dismissed. All *Fortenberry* decided was that the federal claims were barred by a two-year statute of limitations. The state law claims were then dismissed for want of litigated federal claims to which they could be appended.[401]

In sum, Mississippi law devolves upon inside or controlling shareholder/directors incident to their negotiations with minority shareholders for the purchase of the latter's shares, a duty to disclose all facts known to them that a reasonably prudent shareholder may have wished to know before deciding whether to sell his shares. Because Section 75-71-501 is the mirror image of Rule 10(b)(5), the Supreme Court of Mississippi, in the context of such cases, may reasonably be expected to follow the essential premises of *Chiarella v. United States*,[402] to the effect

> that silence in connection with the purchase or sale of securities may . . . [be] actionable. . . . [S]uch liability is premised upon a duty to disclose arising from a relationship of trust

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defendant was grossly insufficient. *Id.* at 1269 n.6.

[398] *Id.* at 1269. The plaintiff further claimed that the defendant exploited Fortenberry's mental condition by fraudulently making material misrepresentations and concealing facts. *Id.*

[399] *Id.* The plaintiff became aware of the transaction through her accountant. *Id.*

[400] *Id.* at 1268. In addition to denying the plaintiff's claims, the defendants asserted that the claims were barred by periods of limitation. *Id.*

[401] *Id.* at 1284, 1288. The court held that a fiduciary relationship between a shareholder and a corporate officer ceased when the stock was conveyed; and therefore, could not toll the applicable limitations period. *Id.* at 1286.

[402] 445 U.S. 222 (1980).

> and confidence between parties to a transaction. Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder's welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information.[403]

Practically speaking, the most important question may be who decides whether information is relevant to a would-be seller's decision. The choices are (a) the director or officer in possession of the information, (b) a hypothetical reasonable prudent would-be seller and (c) the actual seller himself. The answer must be the latter.[404] There is no way anyone else can put himself in the shoes of the would-be seller. Only the seller can know how the information would affect the total mix of facts he considers in deciding whether to sell. By definition, the directors/officers have conflicting interests—they want the seller to sell. An objective hypothetical reasonable seller standard puts the court into the business of deciding when there is no way the court can know all of the relevant facts and interests of the seller. Moreover, a rule that requires that the seller be given the benefit of any doubt and that any error be made on the side of full disclosure works no harm to the legitimate interests of the corporation or the insider directors and officers.

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[403] *Chiarella*, 445 U.S. at 230.

[404] Mississippi has addressed this type of choice of a rule in a legally analogous context. In criminal proceedings, defendants have for years claimed the right of discovery. Mississippi allows liberal discovery in criminal cases, beyond what is allowed in the federal courts and probably beyond what is allowed in most other state courts. For years, the court struggled with the question of who decided whether requested information should be produced by the prosecution in discovery. For very practical reasons, the court decided that the defendant and his counsel can best make that decision and that either the prosecuting attorney or the court itself would necessarily be handicapped and unable to assess whether the defendant had genuine need or use for the information. *See, e.g.*, Dotson v. State, 593 So. 2d 7, 12 (Miss. 1991). The same principle applies here.

X. CONCLUSION

What is to be made of all of this? Is it so that within the core of the law of corporate governance, Mississippi has lately come of age?

Until recently, the undeniable commonality of expression of the director's and officer's duty of care with common law negligence has been little noticed. It has generated little practical exposure for Mississippi's directors and officers to suit for breach of the duty of care, and this is so notwithstanding widespread availability of indemnification and liability insurance. A spate of suits spawned by failed thrifts and other financial institutions shattered this calm for a while, but it appears this movement has about run its course and, indeed, has produced a legal backlash. Legal standards have emerged enhancing directors and officers in their defense from the business judgment rule to the Private Securities Litigation Reform Act.[405] We have felt jarring effect of the ill conceived Senate Bill No. 2389 "clarifying" that bank directors and officers are held only to a gross negligence standard of care. Few lament the demise of the Resolution Trust Corporation.

In years past, our cases were duty of loyalty cases and our few duty of care cases were bank cases. Our judicial utterances understandably focused on fiduciary duties. Our legal analyses accepted the trust model. We have emerged from this formative period. The director's and officer's duty of care is unhinged from the duty of loyalty and its more recent centerpiece, the duty of fair dealing. What role remains for the still familiar fiduciary form of expression is relegated to loyalty cases. To be sure, there are lawyer's briefs yet unwritten that will no doubt talk of fiduciary duties in care cases. The divorce is final, and the law of care and the law of loyalty may be safely seen to make new and separate lives.

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[405] For a sober reflection here, see Note, *When Should Courts Allow the Settlement of Duty-of-Loyalty Derivative Suits?*, 109 HARV. L. REV. 1084, 1085 (1996) (discussing current reform proposals targeted at reducing amount of frivolous or invalid claims brought against corporate fiduciaries).

The legislature has now taken an enlightened and practical approach to director loyalty concerns. Disclosure and ratification by disinterested directors preclude an attack on most arguably ill-advised conflicting interest transactions. More important, the legislature has also commanded the converse. If a transaction was demonstrably fair to the corporation at the time it was entered, the judicial inquiry is at an end, for in that instance it no longer matters how extensive the conflict, how inadequate the disclosure, nor whether there has been ratification at all. And this is as it should be. What possible public interest is served by condemning substantively fair deals just because a lot of technical formalities have not been met? The courts would do well to look to the legislature for guidance in the general run of fiduciary duty cases.

One conclusion may safely be drawn. In the field of corporate governance, as perhaps in no other, this state's lawmakers have eagerly embraced the law as written beyond our borders. We passed the Model Business Corporation Act in 1962 and followed twenty-five years later with the Revised Model Business Corporation Act. We amend the RMBCA—annually to keep abreast of the work of the ABA's Committee on Corporate Laws. Our courts routinely cite cases from other, more experienced jurisdictions and liberally draw from treatises, texts and most recently the *Principles of Corporate Governance*. While the work of the ABA's Committee's Revised Model Act and the American Law Institute's *Principles* may not be perfect and are not free from controversy, we sensibly assume they are the best there is.

Fundamental has been the reemergence of risk taking by the investing public, the refinement of the balance between enterprise and accountability with the realization that to date we have not learned how to design a legal system that at once enhances accountability without imposing too great a price on enterprise. The intelligence and insight of the investing public in an open and informed corporate world is for the most part a more sensible regulator than our process of adjudication in all of its costly cumbersomeness.

We have always known too much legal intervention in the corporate decision-making process could be counter productive and we have a few cryptic judicial utterances to that effect. This view has now found full expression in *Omnibank*'s embrace and articulation of the business judgment rule. Happily, we have seen that rule one of substantive law prescribing standards for conduct, eschewing the awkward and elusive evidentiary presumption form of the rule. Within the core of the law of corporate governance, Mississippi has lately come of age.

THE MISSISSIPPI COURT OF APPEALS: HISTORY, PROCEDURES, AND FIRST YEAR'S JURISPRUDENCE

Leslie H. Southwick[*]

In 1993, or so one account goes, an insistent leader of the Mississippi Bar finished presenting to a key legislator the reasons for voting to create a court of appeals. The legislator replied, "You say we have too many appeals for the supreme court to handle, but that all we need to do is add *a few more judges*?" As legislators are wont to do, he said, "That reminds me of a story." Leaning back in his chair and putting his feet on his desk, he proceeded.

> A hundred years ago two pioneers on horseback sat atop a hill, looking west into the expanse of the west Texas desert. One, much more impressed by the possibilities than the other, said "All this country needs is a little water and a few more good men."
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> The other retorted, "Yes, and that's all Hell needs too."[1]

Regardless of any misgivings similar to those expressed in the story, a Court of Appeals was created. Since January 3, 1995, a few more men and one woman have been engaged in the task of dispensing Mississippi appellate justice. Answering whether the decision to add people to the problem helped solve it depends on perspective. The results can be measured mathematically with precision, as a count of the number of opinions is readily available. The jurisprudential impact is also beyond much doubt: since state supreme court rules barred the publication of opinions during the first year and denied precedential effect to the unpublished opinions, the case law of the state has not been affected. The more important and subjective perspective is whether the court of appeals has during its first year proved it can play a significant and positive role in our judicial system.

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[*] Judge, Mississippi Court of Appeals, January 1995 to present.

[1] Chief Judge John J. Frasier, Jr. told his story in a speech, with story-teller perfect accents and inflections. The story has been borrowed here with the knowledge but without the expression of Judge Frasier, who may prefer that it not be worn out.

This article will start with an historical survey of the Mississippi court system. That survey will close with a discussion of the legislative maneuvering that led to the passage of a bill creating the Court of Appeals. Leaving history and entering procedure, this article will then examine how the court operates — the effect of the new Rules of Appellate Procedure, the kinds of cases the court receives, and an overview on how a case is handled internally. A brief sketch of each of the ten judges of the Court of Appeals will then be presented with summaries of two significant opinions that each judge wrote during 1995. Finally, this article will present some views on what to expect from the Court of Appeals in the future.

A BRIEF HISTORY OF MISSISSIPPI APPELLATE COURTS 1817-1952

Since its admission to the United States in 1817, Mississippi has had four constitutions. The most noticeable change regarding the judiciary has been in the method of selecting judges—alternating among legislative selection, executive appointment, and popular election. The names of our appellate courts have also changed over time. Moreover, the number of judges has likewise continued to increase. In all, the judiciary provisions in Mississippi's constitutions and the legislation under those constitutions have reflected the political tenor of the times.

The Mississippi Constitutions of 1817, 1832, 1869 and 1890 all provided for an appellate court although designated under a variety of names. In the 1817, 1869 and 1890 constitutions, the judicial power of this state was vested, in part, in a supreme court with general appellate jurisdiction.[2] Under the 1832 constitution, the court was called the High Court of Errors and Appeals.[3] Prior to its admission as a state, the Mississippi Territory maintained a Supreme Court of Errors and Appeals in Adams County consisting of appointed judges.[4] An earlier supreme court in the territory had been abolished in 1809.[5]

The Constitution of 1817 did not explicitly state that the supreme court was an appellate court, though the assumption was inescapable. In fact, that Constitution granted the legislature wide latitude in creating Mississippi's court system. The 1817 Constitution stated that the "judicial power of this State shall be vested in one Supreme Court, and such superior and inferior courts of law and equity as the Legislature may, from time to time, direct and establish."[6] The appellate jurisdiction of the supreme court could be inferred from the constitution's provision specifying that the judge from whose decision an appeal had been taken could not participate in the supreme court's consideration of the case other than to provide the court with a basis for his original decision.[7] The court was staffed by legislatively elected judges who served during good behavior.[8] The judges also presided over county trial courts, known as superior courts.[9] The supreme court was given authority over the admission of attorneys to the bar[10] and was required to publish some decisions.[11] Interestingly, the 1817 constitution provided that judges could not be older than sixty-five.[12] As one commentator noted, "[this] provision seems to have stemmed from unfortunate experiences with incompetent elderly judges during the territorial period."[13]

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[2] MISS. CONST. of 1817, art. V, § 1; MISS. CONST. of 1869, art. VI, § 1; MISS. CONST. of 1890, art. VI, § 144.

[3] MISS. CONST. of 1832, art. IV, § 1.

[4] Act of Jan. 20, 1814, *in* STATUTES OF THE MISSISSIPPI TERRITORY 200, § I (1816) (superseded by MISS. CONST. of 1817, art. V). The Act provided that the Supreme Court of Errors and Appeals would meet twice a year in June and December. *Id.*

[5] Act of Dec, 22, 1809, § VI, *in* STATUTES OF THE MISSISSIPPI TERRITORY 179 (1816) (superseded by MISS. CONST. of 1817, art. V). The Supreme Court of the Mississippi Territory had been made up of territorial judges from the courts of General Quarter sessions of the Peace. A Law Establishing Courts of Judicature, Feb. 28, 1799, Sargent's Code 7 (Historical Records Survey 1939). These judges were appointed by the territorial governor. *Id.* at 5, 7.

[6] MISS. CONST. of 1817, art. V, § 1.

[7] MISS. CONST. of 1817, art. V, § 2.

[8] MISS. CONST. of 1817, art. V, § 9.

[9] Act of Dec. 24, 1817, § 1, 1817 Miss. Laws 7, 7-8.

One of the trends in state government reform during the late 1820's and early 1830's was to broaden popular participation by expanding suffrage and changing more political offices to elected positions.[14] In fact, every state but one replaced or significantly amended its constitution during this period.[15] Jacksonian democracy expressed itself in Mississippi in several ways in the Constitution of 1832. One of these ways was by discarding the appointive system for judges. A three judge High Court of Errors and Appeals was elected with their terms limited to six years.[16] The court replaced the former supreme court of the 1817 constitution.[17] The governor was, however, permitted to make appointments to fill vacancies of less than one year.[18] The court was expressly denied any jurisdiction other than "such as properly belongs to a court of errors and appeals."[19] Unlike the 1817 Constitution which did not provide a minimum age for service on the court, the 1832 Constitution required that candidates for the court be at least thirty years old.[20] Court was held in Jackson by constitutional mandate beginning in 1836.[21]

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[10] Act of Feb. 12, 1819, §§ 7-8, 1819 Miss. Laws 53, 55-56.

[11] Act of Feb. 20, 1819, § 1, 1819 Miss. Laws 115, 115. The Acts provided that the court would appoint a "suitable" person to report the court's decisions. *Id.* at 115.

[12] MISS. CONST. of 1817, art. V, § 10.

[13] Steven A. Patterson, Mississippi's Four Constitutions: A Study of Political Response to Societal Change 12 (1974) (unpublished M.A. thesis, University of Mississippi) (on filed with the author).

[14] ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 12-15 (1945). However, it was also during this time that property ownership determined who could vote. *Id* at 12-13.

[15] Robert J. Haws, *The Mississippi Constitution of 1832, in* UNDERSTANDING MISSISSIPPI'S CONSTITUTIONS: AN HISTORICAL PERSPECTIVE 10 (Barbara Carpenter ed., 1989).

[16] MISS. CONST. of 1832, art. IV, §§ 2, 3.

[17] Act of Feb. 27, 1833, ch. LXI, 1833 Miss. Laws 132. Under the Act, the High Court of Errors and Appeals would preside in a manner much the same as the former supreme court had. *Id.*

[18] MISS. CONST. of 1832, art. IV, § 5.

[19] MISS. CONST. of 1832, art. IV, § 4.

Beneath the High Court of Errors and Appeals, a nascent intermediate court was established—the Superior Court of Chancery.[22] There had been a previous superior court of chancery established by the legislature under the 1817 Constitution with appellate review authority.[23] The court under the 1832 constitution had a chancellor who was elected by the state as a whole to a six-year term.[24] The court heard appeals from the district chancery courts unless, by consent of the parties, the matter was taken directly to the High Court.[25] The court is reminiscent of the territorial superior court which heard appeals in the district of Washington, Mississippi, taken from the territorial courts.[26]

Concomitant with Mississippi's reentry into the Union after the Civil War was the adoption of a new constitution. The 1868 constitutional convention focused mainly on voting rights of former Confederate officials, black suffrage, and an oath requiring a voter to "admit the political and civil equality of all men, so help me God."[27] As a lesser issue, appointment of judges was revived for reasons some historians have found to be mainly political.[28] The Republicans in control of the convention believed the governor's office would continue to be held by Republicans. Their long-term majority presumably would come from the almost unanimous vote of freed slaves and a minority of white voters, while the Democrats were to have many of their number disenfranchised by the oath required of voters.[29] Thus the convention settled on the governor's appointing all judges above justice of the peace. Though a Republican measure, some philosophical opposition to an elective judiciary from other quarters added to the votes in favor of the section:

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[20] MISS. CONST. of 1832, art. IV, § 6.

[21] MISS. CONST. of 1832, art. IV, § 7. The court was to convene twice a year. *Id.*

[22] MISS. CONST. of 1832, art. IV, § 16.

[23] Act of Nov. 27, 1821, ch. XLI, §§ 1, 21, 1821 Miss. Laws 105, 111. The court had jurisdiction to hear appeals from "any court of probate, *certiorari*, or other legal means . . . ." *Id.* at 111.

[24] MISS. CONST. of 1832, art. IV, § 16.

[25] 1 Freeman's Reports at vi (1844).

[26] Act of Feb. 10, 1807, § XXVI, *in* STATUTES OF THE MISSISSIPPI TERRITORY 138 (1816) (superseded by MISS. CONST. of 1817, art. V). The Act gave the territorial judges authority to hear appeals from the supreme court, the circuit courts, or the district court of Washington. *Id.* at § 1.

[27] WILLIAM C. HARRIS, DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI 139-55 (1979). Significantly, the convention abolished property qualifications for holding offices and removed property or educational qualifications for voting. Patterson, *supra* note 13, at 50-51.

> An elective judiciary is the abomination of the age .... In 1832 the demagogues carried the day, and the wild democracy degrated the courts by exposing them to the dependence—partisan dependence [of the people].[30]

Under the 1868 Constitution, the governor was given the authority to appoint three judges to the supreme court subject to the advice and consent of the legislature—one from each of three supreme court districts.[31] The judges served for staggered nine-year terms.[32] Jurisdiction was defined as that "properly belong[ing] to a Supreme Court."[33] Service was again limited to persons thirty years of age or older, and it was additionally required that candidates be a citizen of the state for at least two years.[34] The court remained in Jackson as it had under the 1832 Constitution.

The current constitution was adopted in 1890. An appointive judiciary continued, indicating appointment of judges had much broader support than just among the depleted Republican ranks. Nonetheless, one historian, Secretary of State Eric Clark, said that probably "the most controversial secondary problem which the delegates [to the 1890 convention] had to consider was whether to institute an elective judiciary."[35] A majority of the convention's Judiciary Committee favored an appointive system to avoid election of the "windiest demagogue."[36] A minority proposed election of justices from northern and southern districts, while in the western district, which would be majority black, the justices would be appointed by the governor.[37] A proposal for an elective judiciary was defeated by the full convention on a fifty-five to thirty-six vote. Thus, for another twenty years, Mississippi had appointed judges.

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[28] HARRIS, *supra* note 27, at 147.

[29] *Id.*

[30] *Id.* at 155 (quoting letter from John A. Orr to Governor Ridgley C. Powers (Dec. 29, 1872)).

[31] MISS. CONST. of 1869, art. VI, § 2. The legislature, under § 2, divided the state into three districts. *Id.*

[32] MISS. CONST. of 1869, art. VI, § 3.

[33] MISS. CONST. of 1869, art. VI, § 4.

[34] MISS. CONST. of 1869, art. VI, § 6.

Under the 1890 constitution, the title "supreme court" remained in place and the Court remained one of appellate jurisdiction without formal original jurisdiction.[38] Originally, the Court consisted of three members appointed by the governor to nine-year terms.[39] An appointive judiciary came under assault, however, as early as January 1898, when the Governor recommended and the legislature passed a constitutional amendment to elect all judges, including the three-judge supreme court.[40] The people ratified the amendment in 1899, with seventy-one percent of the voters in favor.[41] During the 1900 legislative session, the legislature passed a statute that terminated the terms of all incumbent chancellors and circuit judges on May 10, 1900, the effective date of the statute implementing the new amendment.[42] Circuit Judge Robert Powell, appointed by the governor in January, refused to relinquish his office.[43] Suit was filed on May 11, 1900, by the Attorney General of Mississippi to remove Judge Powell.[44] The supreme court found that the amendment violated a provision in Article 15, Section 273 of the Mississippi Constitution.[45] The provision stated that if the substance of several different amendments were joined into the form of a single amendment, such that the voters could not vote on each actual amendment separately, then the submission to the people was invalid.[46] Because the 1899 amendment consisted of "at least four separate amendments," the court determined the amendment to be invalid.[47] During the next ten years numerous votes were taken in the legislature to compel judicial elections, but each failed, perhaps in part because of general support for an appointive judiciary from the State Bar and many newspapers.[48]

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[35] Eric Charles Clark, The Mississippi Constitutional Convention of 1890: A Political Analysis 131 (1975) (unpublished M.A. thesis, University of Mississippi).

[36] *Id.*

[37] *Id.* at 132.

[38] MISS. CONST. of 1890, art. VI, §§ 144, 146.

[39] MISS. CONST. of 1890, art. VI, § 145. Article VI provided that the legislature would divide the state into three supreme court districts before the Governor made his selection. *Id.* The Governor's supreme court appointments were also to be made with the "advice and consent" of the senate. *Id.*

[40] JOHN RAY SKATES, JR., A HISTORY OF THE MISSISSIPPI SUPREME COURT, 1817-1948, at 47 (1973). The amendment called for supreme court judges to serve eight year terms. *Id.*

[41] State *ex rel.* McClurg v. Powell, 77 Miss. 543, 550 (1900) (including material not contained in regional reporter).

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[42] *McClurg*, 77 Miss. at 551. The statute by which the terms of all incumbent chancellors and judges were terminated was approved on March 10, 1900, and in accordance with the Mississippi Constitution became operative sixty days after its passage on May 10, 1900. *Id.*

[43] *Id.* Judge Powell did not recognize the act as valid. *Id.*

[44] *Id.* Judge Powell, in the meantime, continued to perform his duties as circuit judge. *Id.*

[45] State *ex rel.* McClurg v. Powell, 27 So. 927, 936 (Miss. 1900). Article 15, section 273 of the Mississippi Constitution authorizes the legislature to submit constitutional amendments to the people, and provides "that if more than one amendment is submitted at one time, they shall be separately submitted. . . ." MISS. CONST. of 1890, art. XV, § 195. The court stated that because the amendments had not been adopted by a majority of all the qualified voters who voted, the amendments were null and void. *McClurg*, 27 So. at 936.

[46] *McClurg*, 27 So. at 930-93.

[47] *Id.* at 936. The issue of whether an amendment,, in form is actually numerous amendments has long bedeviled the supreme court. *See* Leslie H. Southwick & C. Victor Welsh, III, *Methods of Constitutional Revision: Which Way Mississippi?*, 56 MISS. L.J. 17, 39-48 (1986) (examining Mississippi cases highlighting court's inability to consistently decide whether amendments are truly separate); *see also* State *ex rel.* Moore v. Molpus, 578 So. 2d 624, 629-30 (Miss. 1991) (discussing amendments which violated § 273); Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848, 853-59, 876-77 (Miss. 1988) (noting that tax amendment could be severed into several different amendments).

[48] CHARLES GRANVILLE HAMILTON, PROGRESSIVE MISSISSIPPI 133 (1978); SKATES, *supra* note 40, at 47.

Mississippi's appointive judiciary finally fell to the same political waves that rolled through much of the country during the second decade of the twentieth-century: the Progressive Movement. In the perceived battle between corporate interests and the people, appointed judges were seen as siding with big business.[49] The first wave of change struck in 1910 when the legislature submitted to the people a constitutional amendment providing for election of circuit and chancery judges.[50] The amendment passed with almost eighty percent of the vote.[51] In 1900, the supreme court stated that *one* problem with the 1899 amendment was that changing the mode of selecting circuit judges and chancellors could not be done in one amendment.[52] The legislature was justifiably concerned that the 1910 amendment would be struck down as well, so in 1912 it passed a resolution "cheerfully join[ing] his Excellency, the Governor of Mississippi, in a respectful request to the Supreme Court of the State to render an immediate opinion" on constitutionality.[53] The supreme court rejected the reasoning in *Powell,* at least to the extent of election of chancery and circuit judges being a necessary subject for two amendments, and upheld the 1910 amendment as valid.[54]

As a harbinger of what was to occur with the crowded supreme court dockets of the 1980's and the creation of a magistrate program in 1990, the legislature in 1910 also tried to relieve the three overworked justices by providing for the appointment of two supreme court Commissioners.[55] The governor would appoint and the senate confirm, with each commissioner to have the same salary and term as a supreme court justice.[56] One of the first commissioners was Chief Justice A.H. Whitfield, who resigned as a justice and was appointed as a commissioner.[57]

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[49] HAMILTON, *supra* note 48, at 132-33.

[50] H. Con. Res. 19, 1910 Leg., Spec. Sess., 1910 Miss. Laws 306 (enacted).

[51] *The Official & Statistical Register of the State of Mississippi* 119-21 (1912). The vote was 19,013 in favor of and 4,036 in opposition to the amendment. *Id.*

[52] *McClurg,* 27 So. at 930-31. The court stated that the selection of circuit judges and chancellors were "disconnected" from one another and thus required a separate vote. *Id.*

[53] S. Con. Res. 44, 1912 Leg., Reg. Sess., 1912 Miss. Laws 467.

[54] State *ex rel.* Collins v. Jones, 64 So. 241, 254-55 (Miss. 1914). The Governor vetoed a 1912 bill that provided the procedures for the election of these judges. *Collins,* 64 So. at 255.

[55] Act of Mar. 16, 1910, ch. 164, 1910 Miss. Laws 158, *repealed by* Act of Feb. 8, 1912, ch. 259, 1912 Miss. Laws 327.

In 1912, the commissioner act was repealed[58] and an attempt made to create an intermediate "Court of Appeals of Mississippi."[59] The full text of the Court of Appeals bill is not in the House Journal, but the parts that are indicate the court was to have three judges, one *elected* from each supreme court district with the same nine-year terms as justices.[60] Whether all cases would first be appealed to that court is not stated in the House Journal. Whether the judges' salary should be $3,500 or $5,000 became an issue.[61] One representative explained his "no" vote on the bill by saying "I think thirty-five hundred dollars is entirely sufficient to procure all necessary judicial capacity," but he opposed the bill for other reasons. Another voted "no" on the bill "because no good lawyer can afford to run for this office before the people on a salary of $3,500.00."[62] The final House vote on the measure defeated it by a twenty-eight to eighty-nine vote.[63]

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[56] *Id.* at 158-59. The commissioners' duties under the Act were to assist with the functions of the supreme court and to aid in the disposition of cases. *Id.* at 159. The Act further provided that the initial terms would extend nine years for one commissioner and six years for the other commissioner. *Id.* However, each Commissioner's successor would subsequently serve a nine-year term. *Id.*

[57] SKATES, *supra* note 40, at 50. Former Chief Justice Whitfield filled the Commissioner's position with the nine-year term while Frank A. McLain filled the Commissioner's position with the six-year term. *Id.*

[58] Act of Feb. 8, 1912, ch. 259, 1912 Miss. Laws 327. Former Chief Justice Whitfield's position as commissioner was abolished less than two years after commencement; thus, after a brief return to private practice he became Dean of Millsaps School of Law. SKATES, *supra* note 40, at 104.

[59] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISS. H.B. No. 195, at 140 (Reg. Sess. 1912) [hereinafter 1912 HOUSE JOURNAL]. The bill was officially titled, An Act to Create an Additional Inferior Court of Record in this State, to be known and styled the Court of Appeals of Mississippi. 1912 HOUSE JOURNAL at 580.

[60] *Id.* at 580-81.

[61] *Id.* at 582.

[62] *Id.* at 583-84.

The 1912 legislature continued to pass reforms championed by the Progressive Movement including bills for local initiative, referendum and recall of officials (which was vetoed), and submission to the voters of an amendment to create statewide initiative and referendum. The amendment for initiative and referendum,[64] another that permitted less than unanimous civil jury verdicts[65] and a third that changed the formal caption needed on legislative bills[66] passed overwhelmingly in November 1912, but not by the then-required majority of all votes cast in the election.[67] In 1914, the legislature tried again, submitting nine constitutional amendments, including six that dealt with the court system for ratification in November, 1914.[68] Notably, while six of the proposals dealt with the court system, they were submitted separately—the legislature may have remembered the 1898 problem of submitting a multipurpose provision as just one amendment.[69] These amendments included provisions providing for the popular election of supreme court justices,[70] an increase in the court's membership to six members[71] and a reduction of the members' terms to eight years.[72] For the first time, the court was permitted to sit in divisions, removing the need for all justices to review all cases[73] All the amendments were ratified.[74] When the next legislature met in 1916 and made the formal steps of inserting the amendments into the constitution, that body authorized Governor Theodore Bilbo to appoint three extra justices "immediately upon this act becoming effective" on March 21, 1916.[75] Those three new justices could then run in the November, 1916 election.[76]

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[63] *Id.* at 584.

[64] S. Con. Res. 9, 1912 Leg., Reg. Sess., 1912 Miss. Laws 453. The act provided that, before the people could exercise their right of initiative and propose legislation, any proposal must have garnered the endorsement of fifteen percent of the voters. *Id.* § 2. The proposed amendment further provided that proposed amendments to the Constitution required the endorsement of twenty percent of voters. *Id.* The power of referendum was contingent upon ten percent of the voters signing a petition. *Id.*

[65] H. Con. Res. 37, 1912 Leg., Reg. Sess., 1912 Miss. Laws 452. Under the proposed amendment, the legislature could pass a law that allowed civil verdicts to be supported by the agreement of nine or more jurors. *Id.*

[66] S. Con. Res. 8, 1912 Leg., Reg. Sess., 1912 Miss. Laws 452. The style of all bills under the proposed amendment would read: "be it enacted by the people of the State of Mississippi." *Id.*

[67] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISS., *Table: Vote for Ratification or Rejection of Constitutional Amendments*, at 102-03 (Reg. Sess. 1914); *see also* Southwick & Welsh, *supra* note 47, at 34-35 n.69.

[68] S. Con. Res. 29, 1914 Leg., Reg. Sess., 1914 Miss. Laws 522 (enacted) (proposing amendment for election of supreme court judges); S. Con. Res. 31, 1914 Leg., Reg. Sess., 1914 Miss. Laws 523 (enacted) (proposing amendment to set supreme court judges' term of office); S. Con. Res. 30, 1914 Leg., Reg. Sess., 1914 Miss Laws 524 (enacted) (proposing elimination of section 151 of Mississippi Constitution); S. Con. Reg. 33, 1914 Leg., Reg. Sess., 1914 Miss. Laws 524 (enacted) (proposing elimination of provision providing for trial by three judges upon party's request); S. Con. Res. 28, 1914 Leg., Reg. Sess., 1914 Miss. Laws 525 (enacted) (proposing amendment providing for six supreme court judges); S. Con. Res. 32, 1914 Leg., Reg. Sess., 1914 Miss. Laws 526 (enacted) (proposing amendment providing for supreme court judges to sit in two divisions); H. Con. Res. 24, 1914 Leg., Reg. Sess., 1914 Miss. Laws 526 (enacted) (proposing initiative and

Over the next 30 years, the case load again became unmanageable for the high court. The State Bar at its 1949 annual meeting passed a resolution endorsing an increase in the size of the court to nine, saying "this situation has become so

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referendum); H. Con. Res. 3, 1914 Leg., Reg. Sess., 1914 Miss. Laws 529 (enacted) (proposing amendment authorizing majority jury verdicts); S. Con. Res. 37, 1914 Leg., Reg. Sess., 1914 Miss. Laws 530 (enacted) (proposing amendment for apportionment of senators).

[69] SKATES, *supra* note 40, at 50.

[70] S. Con. Res. 29, 1914 Leg., Reg. Sess., 1914 Miss. Laws 522 (enacted); MISS. CONST. of 1890, art. VI, § 145 (1916).

[71] Act of Mar. 21, 1914, ch. 518, 1814 Miss. Laws 525.

[72] Act of Mar. 21, 1914, ch. 515, 1914 Miss. Laws 523; MISS. CONST. of 1890, art. VI, § 145A (1916).

[73] S. Con. Res. 32, 1914 Leg., Reg. Sess., 1914 Miss. Laws 526 (enacted). The division of the court into two districts was an effort to help the supreme court keep pace with the expanding case load. SKATES, *supra* note 40, at 50.

[74] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISS., H.B. Nos. 1-9, at 197-208 (Reg. Sess. 1916). Each amendment won by a comfortable two-to-one margin. SKATES, *supra* note 40, at 50.

[75] Act of Mar. 21, 1916, ch. 161, § 7, 1916 Miss. Laws 224, 225 (repealed 1986). There was no provision for senate confirmation. *Id.* at 225. Theodore Bilbo became governor of Mississippi on January 18, 1916. *Mississippi Official & Statistical Register 1992-1996*, at 51 (1993).

[76] Act of Mar. 21, 1916, ch. 161, 1916 Miss. Laws 224 (repealed 1986). There was no provision for senate confirmation.

acute and distressing in the opinion of the members of the Mississippi State Bar that it constitutes an emergency. . . ."[77] Pending ratification of a constitutional amendment adding three more justices, the Bar recommended a statute that would permit the governor to appoint three commissioners who would serve with and assist the supreme court.[78] In 1950, the legislature adopted both proposals. The governor was authorized to name and the Senate to advise and consent on three commissioners of the supreme court, who must be "persons of legal learning and personal worth . . . ."[79] Governor Fielding Wright appointed Olney Arrington, J.P. Coleman, and James G. Holmes, who took office on September 1, 1950.[80] That lineup was rather temporary. On October 10, 1950, Supreme Court Justice L.A. Smith, Sr. died.[81] In an intriguing bit of high office shifting Governor Wright named state Attorney General John Kyle to fill the supreme court vacancy, named Commissioner J.P. Coleman as Attorney General, and placed Ole Miss law professor W.N. (Billy) Ethridge, Jr. in Coleman's commissioner seat.[82] These commissioners, appointed to aid the justices under rules adopted by the supreme court, would serve four-year terms but would have their offices abolished if the court were increased to nine members.[83]

That increase was the subject of a constitutional amendment submitted to the voters in 1950, which created a nine-judge court, each justice to have an eight-year term.[84] Candidates for positions on the court were still required to be at least thirty years of age and, in addition, were required to have practiced law and been a citizen of Mississippi for at least five years.[85] The court's home remained in Jackson.[86] The 1950 State Bar annual convention, concerned "that the voters of Mississippi do not readily vote to change their Constitution unless they are fully advised in the premises," resolved to support the ratification of the amendment through public forums, and newspaper and radio advertisements, organized and funded by each county bar association.[87] The amendment was ratified in the November 1950 election.[88] By the same January 1952 statute which inserted the amendment into the constitution, the governor was authorized to fill the vacancies until the November 1952 election.[89] Governor Wright appointed the three commissioners as justices on January 16, 1952, just a week before Wright left office.[90] The 1950 Act, creating the office of Supreme Court Commissioner was repealed.[91]

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[77] *Resolution that the Number of Supreme Court Justices be Increased to Nine*, Resolution No. 3 (44th Annual Meeting of Mississippi State Bar, June 3-4, 1949), *reprinted in* 20 MISS. L.J. 424, 478-79 (1940) [hereinafter *Resolution*]. The State Bar introduced the resolution in response to the ever increasing appellate caseload which had grown tremendously after World War II. *Id.* at 478.

[78] *Id.* The Bar Association's resolution requested that Governor Fielding L. Wright convene the legislature in a special session to act on the proposal. *Id.*

[79] Act of Mar. 21, 1950, ch. 317, § 1, 1950 Miss. Laws 352, 352. The Act provided that the governor appoint one commissioner from each district who possessed the same qualifications as judges of the supreme court. *Id.*

[80] 208 Miss. iii (1950).

[81] SKATES, *supra* note 40, at 95. Justice Smith served on the supreme court from 1945 until he died of a heart attack in 1950. *Id.*

[82] *Congratulate Three New State Officials*, JACKSON DAILY NEWS, Oct. 23, 1950, at 1. Judge Harvey McGehee, the Chief Justice of the Mississippi Supreme Court, administered their oaths of office the morning of October 23, 1950. *Id.*

[83] Act of Mar. 21, 1950, ch. 317, § 2, 1950 Miss. Laws 352, 352-53.

In his six years as governor, Fielding Wright appointed five men to the supreme court, two attorneys general,[92] as well as four commissioners. Since 1916 when governors lost the authority to appoint all supreme court justices, Wright must rank among those governors with the most significant personal impacts on the court system.

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[84] S. Con. Res. 29, 1914 Leg., Reg. Sess., 1914 Miss. Laws 522 (enacted); MISS. CONST. of 1890, art. VI, § 145BV (1952).

[85] MISS. CONST. of 1890, art. VI, § 1.

[86] MISS. CONST. of 1890, art. VI, § 148.

[87] *Resolution Supporting Proposed Amendment to the Mississippi Constitution*, (49th Annual Meeting of Mississippi State Bar, June 22-23, 1950), *reprinted in* 21 MISS. L.J. 429, 492 (1950).

[88] 1949-1951 Miss. Reg. 357 (1952).

[89] Act of Jan. 16, 1952, ch. 244, § 2, 1952 Miss. Laws 271, 272 (repealed 1986). There was no provision for senate confirmation of the appointments. *Id.*

[90] 211 Miss. iii (1951). Governor Wright served from November 2, 1946 through January 22, 1952. 1992-1996 Miss. Reg. 51 (1993).

[91] Act of Jan. 16, 1952 Miss. Laws ch. 244, § 1.

[92] In addition to J.P. Coleman, Wright had earlier appointed John W. Kyle as attorney general. The office had become vacant when five-term attorney general Greek L. Rice died on February 21, 1950. John M. Kuykendall, *Attorney General Greek L. Rice*, 21 MISS. L.J. 303 (1950); *In Memoriam: Mr. Justice John William Kyle*, 252 Miss. at 4, introductory section (1965).

After all these amendments, a nine-justice court, three justices serving from each of three separate districts, was in place.

II. THE CREATION OF THE COURT OF APPEALS

The workload of the state's highest court has changed *somewhat* over the years, as only eighteen cases were heard by the court in its first year.[93] One-hundred fifty years later, in 1968-69, 352 cases were decided on the merits by the Court.[94] The preceding review of supreme court history has disclosed that appellate overload has been recurrent. The solutions usually entailed either increasing the number of justices on the supreme court—tripling from three to nine in less than forty years—or using temporary measures such as naming commissioners for the court. The upward spiral of cases never stopped. Some observers hypothesized, as early as 1970, that there would be "a future need for an intermediate appellate court."[95] In 1969, on average a supreme court decision was handed down 425 days after the trial court judgment.[96]By 1976, the average delay between trial and appellate decision had increased to 522 days, a 100 day rise in seven years.[97] That year the legislature allowed the court to request active chancellors and circuit judges to serve temporarily as commissioners in order to assume some of the caseload.[98] The statute had an automatic repealer and expired at the end of 1978.[99] By 1979 the average time between trial and appellate judgments had dropped back to 410 days.[100] Moreover, the average time of delay had dropped to 394 days in 1980,[101] well over half of that time being taken up by preparation of the trial court transcript and briefing.[102]

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[93] 1988 MISS. SUP. CT. ANNUAL REP. 3.

[94] 1968-69 MISS. SUP. CT. ANNUAL REP., Statistics, Table IV.

[95] Report of the Mississippi, Judiciary Commission to the 1970 Regular Session of the Legislature of the State of Mississippi 41 (Mary Libby Payne, Exec. Sec., 1970).

[96] *Id.* at C-16.

[97] 1979 MISS. SUP. CT. ANNUAL REP. 6. This number was calculated using the mean and range provided in the report. *Id.*

[98] Act of May 6, 1976, ch. 430, § 1, 1976 Miss. Laws 630, 630.

[99] *Id.* § 2. Future Court of Appeals Judge Billy Bridges served as a commis-

The reduction in appellate delay halted in 1981. For the dozen years leading up to the passage of the 1993 statute creating the court of appeals, the number of appeals gradually and haltingly rose, but increasing nearly three-fold were the backlog of undecided cases and the delay between the final judgment in the trial court and supreme court action.[103]

Year	Appeals Filed	Appeals Decided	Trial Judgment until Supreme Court Action	Appeals Pending
1981	890	775	375 Days	536
1984	840	639	631 Days	1071
1987	891	831	715 Days	1191
1990	1035	1003	787 Days	1333
1992	1090	941	981 Days	1476

In 1990, Mississippi had by far the largest population of the eleven states that had only a single appellate court.[104]

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[100] 1979 MISS. SUP. CT. ANNUAL REP. 6.

[101] Beverly Pettigrew-Kraft, *Intermediate Court Aims To Attack Appeal Delays*, CLARION-LEDGER (Jackson, MS), Apr. 12, 1993, at A5.

[102] 1980 MISS. SUP. CT. ANNUAL REP. 6.

[103] 1992 MISS. SUP. CT. ANNUAL REP. 28; 1990 MISS. SUP. CT. ANNUAL REP. 29; 1986 MISS. SUP. CT. ANNUAL REP. 7. The fourth column, indicating days of delay, is measuring the days between final judgment in the trial court until a supreme court decision.

[104] S. Allan Alexander & Mathew Steffey, *Laying the Groundwork for Court Reform: A Report of the Mississippi Bar's Commission on Courts in the 21st Century*, 14 MISS. C. L. REV. 511, 530 n.11 (1994). For example, in 1990, the population of Mississippi was approximately 2,573,000 while the next most populous state with a single appellate court was West Virginia, with a population of approximately 1,793,000. *Id.* (citing NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990 315 (1992).

Two of those states had more appeals filed, but the numbers were similar: Nebraska with 1270 appeals and Nevada with 1089, compared to Mississippi with 966.[105]

Comprehensive studies of the judiciary after 1985 led to recurring proposals for creation of an intermediate appeals court. There was little doubt something had to be done, but the "devil was in the details." After many years of study and debate, by the time action was taken in 1993 a well-reasoned decision was possible. One of the earliest advocates of creating an intermediate court was the late Chief Justice Neville Patterson. In his State of the Judiciary Address to the 1984 state bar convention, the Chief Justice asked the bar to study the desirability of creating an intermediate court.[106] Patterson favored either creating a court to screen cases or splitting the highest court in two, one for criminal cases and the other for civil. In 1985, Chief Justice Patterson and State Bar President Ernest Graves jointly appointed a task force to study congestion in the appeals process. Scott Welch of Jackson, who would later be State Bar President, headed the group.[107] Testifying in late 1985 before a special subcommittee of the senate judiciary committee, Patterson said an intermediate court was "the only solution" to the supreme court's clogged docket, but that the state's budgetary crisis at that time meant creation was not then feasible.[108] Then-Senator Martin Smith, now head of the Administrative Office of Courts, agreed that the option of a new appellate court both needed studying and was not then-economically feasible.[109]

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[105] Alexander & Steffey, *supra* note 104, at 530. The District of Columbia had the highest number of appeals for a jurisdiction with a single appellate court system. *Id.* The District of Columbia received 1,650 appeals, followed by Nebraska, Nevada and Mississippi. *Id.* Following this group of states, the next closest state received only 642 appeals. *Id.*

[106] Mary Libby Payne, *The Mississippi Judiciary Commission Revisited: Judicial Administration: An Idea Whose Time Has Come?*, 14 MISS. C. L. REV. 413, 440-41 (1994).

[107] *Id.* at 441. Ultimately the State Bar passed only a recommendation for continued study. *Id.* (citing Mississippi State Bar Minutes, 80th Annual General Assembly, at 96 (June 7, 1985)); *see also* Alexander & Steffey, *supra* note 104, at 548-49 (discussing evolution of task force's efforts); Tom Brennan, *Supreme Court Buried Under Caseload*, CLARION-LEDGER (Jackson, MS), Apr. 15, 1985, at B1 [hereinafter Brennan, *Caseload*] (quoting Chief Justice Patterson, "we simply cannot keep up with the caseload.").

[108] Tom Brennan, *Justice Renews Cry for Appeals Court*, CLARION-LEDGER

Governor Bill Allain's Constitutional Study Commission, appointed in 1985 and chaired by former Governor and Judge J.P. Coleman, studied the problem in 1986 as part of a comprehensive review of the state constitution. The commission proposed a draft constitution that provided for "an intermediate appellate court system," consisting of such numbers of judges and districts as initially determined by the supreme court, with that decision then submitted to the legislature.[110] The commission's judiciary committee, chaired by the late Circuit Judge Clarence Morgan, had proposed an article that left creation of an intermediate court to the discretion of the legislature, but the full commission voted to mandate its existence.[111] The draft constitution, however, remained only a draft.

The supreme court itself became increasingly alarmed about case delay. In the first-ever comprehensive planning session regarding the court, eight of the nine justices held a meeting on December 20, 1988, at which they decided to encourage the legislature to "study, plan, and implement an intermediate appellate court system in Mississippi."[112] The result

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(Jackson, MS), Nov. 8, 1985, at B1. Chief Justice Patterson stated that between 1980 and 1985, the Mississippi Supreme Court's caseload tripled and that the court was falling behind at a rate of about 30 cases per month. *Id.*

[109] Brennan, *Caseload, supra* note 107 at B4.

[110] Constitutional Study Commission, *A Draft of a New Constitution for the State of Mississippi, reprinted in* 7 MISS. C. L. REV. 1, 23-24 (1986). Three of the first judges of the Court of Appeals had served on the Constitutional Study Commission: Barber, Payne, and Southwick. Judge Thomas Coleman is the son of the chairman of the Commission.

[111] Brad Chism, *Recommendations of the Judicial Branch Study Committee, Governor's Constitution Study Commission,* 33 MISS. LAW. 1, 13-14 (July/Aug. 1986). The proposed article for the draft constitution also included the proposition that all supreme court justices be appointed by the governor and in addition mandated that justice court judges have law degrees. *Id.*

[112] Affidavit of Amy Whitten (Sept. 25, 1990), at 3, *filed in* Magnolia Bar Ass'n v. Lee, Civ. No. J-90-0413(B), 793 F. Supp. 1386 (S.D. Miss. 1992) (attached as exhibit to Memorandum in Support of Protective Order (Oct. 18, 1990)) [hereinaf-

of the supreme court initiative was a 1989 senate concurrent resolution that created a fifteen-member committee of legislators, lawyers, and judges to examine "the need for an intermediate appellate court and the organizational structure and procedures for implementation of such court" if one were deemed necessary.[113] Representative Cecil Simmons was named chairman, and proceeded to conduct hearings across the state from June through December 1989.[114] Supreme Court Justice Joel Blass told the committee that the sheer numbers of cases that each justice had to handle meant they were not "able to reflect properly on the decisions we make."[115] The committee requested the supreme court's proposal on the structure of an intermediate court. The supreme court unanimously proposed that a six-member court be created, hearing civil and criminal cases, that would be based in Jackson. Trial court appeals would continue to be filed with the supreme court clerk, with the court then deciding which cases to refer to the new intermediate court.[116] Legislation or a supreme court rule would require the supreme court to retain certain categories of cases, such as death penalty appeals, utility rate cases, city annexations, bond issues, and election contests.[117] What was specifically left unaddressed, since the supreme court might be called upon to rule on the question, was whether creation should be by constitutional amendment or by statute.[118] Representative Sonny Meredith of Greenville argued that the backlog would just shift to the new court: "You've got nine people

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ter Whitten Affidavit].

[113] S. Con. Res. 594, 1989 Leg., Reg. Sess., 1989 Miss. Laws 931.

[114] Beverly Pettigrew-Kraft, *Ways of Creating Appeals Court Stirs Controversy*, CLARION-LEDGER (Jackson, MS), Nov. 11, 1989, at B4 [hereinafter Pettigrew-Kraft, *Controversy*]; Whitten Affidavit, *supra* note 112, at 4.

[115] Beverly Pettigrew-Kraft, *Supreme Court Justices Make Plea for Appeals Court*, CLARION-LEDGER (Jackson, MS), July 1, 1989, at B1 [hereinafter Pettigrew-Kraft, *Plea*]. Justice Blass further stated that "[r]ight now we are making mistakes, because of the volume of cases." Pettigrew-Kraft, *Controversy*, *supra* note 114, at B4.

[116] Whitten Affidavit, *supra* note 112, exhibit 4, at 2.

[117] Whitten Affidavit, *supra* note 112, exhibit 4, at 2 n.4.

[118] Whitten Affidavit, *supra* note 112, at 6.

right now that can't handle it. How can you expect six to do it?"[119]

Two subcommittee reports were prepared, one endorsing an intermediate appellate court along the lines of the supreme court's recommendations, and the other urging creation of a three-person magistrate program to assist the supreme court in performing its duties.[120] The full committee approved several bills for introduction at the 1990 legislative session, including a resolution submitting an amendment to the voters to add a Section 151 to the constitution.[121] This was a broad, discretionary authorization for the legislature to create an appellate court. Judges could be selected by appointment or election; the court would hear such cases as given it by the supreme court. The resolution was adopted by the House of Representatives,[122] but died in a Senate committee.[123] The supreme court, in a 1995 decision, held that an intermediate appeals court could exist without constitutional authorization.[124] Another 1990 House bill proposed to create a six-judge statutory court. Two judges were to be appointed initially from each supreme court district and were to serve until a general election, but the bill died in committee.[125] Instead of creating an intermediate court, the legislature in 1990 only established a three-person magistrate program.[126] The supreme court could appoint, from each of its three supreme court districts, one magistrate who would "aid and assist the [s]upreme [c]ourt in the performance of its duties . . . ."[127] The court named former Circuit Judge Jack Weldy, former assistant attorney general Billy Gore, and a former vice-chairman of the senate judiciary committee and the man who would five years later become the first chief judge of the court of appeals, John Fraiser.[128]

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[119] Pettigrew-Kraft, *Controversy*, *supra* note 114, at B4. Representative Meredith also believed that the only way to create the new intermediate court of appeals was by constitutional amendment. *Id.*

[120] Whitten Affidavit, *supra* note 112, at 7.

[121] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISS., H. Con. Res. No. 92, at 364-65 (Reg. Sess. 1990).

[122] *Id.* at 365. The resolution was approved by the House on February 8, 1990, by a 95-25 vote. *Id.*

[123] STATE OF MISS. SENATE JOURNAL, H. Con. Res. No. 92, at 570, 577 (Reg. Sess. 1990).

[124] Marshall v. State, 662 So. 2d 566, 570-72 (Miss. 1995). The supreme court held that Article 6, § 172 of the Mississippi Constitution gave the legislature full authority to establish an inferior appellate court. *Marshall*, 662 So. 2d at 570-71.

[125] JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MISS., H.B. No. 1251, at 103, 1379 (Reg. Sess. 1990); *see also* Whitten Affidavit, *supra* note 112, at 8.

[126] Act of Mar. 13, 1990, ch. 363, 1990 Miss Laws 119 (codified at MISS. CODE

Suit was filed by black plaintiffs on August 17, 1990, arguing that the creation of the magistrate program violated Section 5 of the Voting Rights Act, since it created three new quasi-judicial positions without first seeking Justice Department approval.[129] Summary judgment in favor of the state was granted on that part of the suit on September 24, 1991.[130] The suit continued as to claims that multimember supreme court districts and the configuration of those districts were violative of the Voting Rights Act. The existing system was ultimately validated by the federal courts.[131] The magistrate program was considered an interim one, as the legislation had an automatic repealer effective as of December 31, 1995.[132] Opinions were not issued over the magistrates' names, but through research and writing of draft opinions all three magis-

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ANN. § 9-3-47 (1972)).

[127] MISS. CODE ANN. § 9-3-47(2) (1972).

[128] 1991 MISS. SUP. CT. ANNUAL REP. 37.

[129] Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386, 1391 (S.D. Miss. 1992), *aff'd*, 994 F.2d 1143 (5th Cir.), *cert. denied*, 114 S. Ct. 555 (1993). The plaintiffs claimed that, under § 9-3-47 of the Mississippi Code, the magistrates performed judicial functions. *Magnolia Bar Ass'n*, 793 F. Supp. at 1391 n.3.

[130] *Magnolia Bar Ass'n*, 793 F. Supp. at 1391 n.3. Plaintiffs made two challenges that the electoral system impermissibly diluted the voting strength of blacks. *Id.* at 1390. First, plaintiffs contended that the staggered at-large elections diluted black voting strength by "subsuming insular black geographical areas into larger majority white voting districts and spacing elections so blacks [could not] marshal their most effective electoral effort." *Id.* Second, plaintiffs argued that the lines dividing the supreme court districts diluted black voting strength by creating three majority white districts. *Id.* at 1391.

[131] *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1151 (5th Cir.), *cert. denied*, 114 S. Ct. 555 (1993). The Fifth Circuit held that the plaintiffs failed to demonstrate a "legally significant" white voting bloc in the central district supreme court elections. *Magnolia Bar Ass'n*, 994 F.2d at 1147-48.

[132] Act of Mar. 13, 1990, ch. 363, § 3, 1990 Miss. Laws 119, 120.

trates performed valuable adjunct service to the supreme court.

Momentum for a new intermediate court increased when on July 2, 1990, State Bar President Leonard Blackwell created the Commission on the Courts in the 21st Century.[133] Lawyers, judges, and lay people were appointed. Creation of an intermediate court was considered just one of many issues to study that might lead to better operation of the court system. The report of the commission has been published and its reading is encouraged in order to understand the essential role played by so many public-spirited lawyers who contributed their time and their talents.[134] State Bar President Alex Alston took special interest in the issue, renewed the charter for the Commission on the Courts, and dedicated the mid-winter bar meeting in 1991-92 to the issue of the court crisis.[135] Allan Alexander was selected as the new chairwoman of the commission.[136] Among the participants were future Supreme Court Justice Mike Mills, and future Court of Appeals Judges Leslie King and James E. Thomas.[137]

On February 25, 1992 Chief Justice Roy Noble Lee, in what was thought to be the first address by a chief justice to a joint session of the legislature, called on legislators to work with the supreme court to make court reform a priority.[138] "As Chief Justice, I pledge to take the first step in this effort. I will submit to the Legislature for consideration in 1993 a plan for creation of an intermediate appellate court."[139]

The devilish details of a new appellate court were the focus of supreme court justices in mid to late 1992 who journeyed to sister states to study their systems. Justices Armis Hawkins, Michael Sullivan, and Fred Banks divided the work of visiting courts in Iowa and Arkansas.[140] Progress in identifying not just problems but also solutions led to a 1993 legislative package, drafted by Allan Alexander, Amy Whitten, Robert Oswald and others.[141] It consisted of four bills: creating an administrative office of courts, creating a court of appeals, providing more clerical and research support to trial judges, and increasing judicial salaries in order to better retain judges.[142] Drafts of the proposals were shared with the supreme court prior to submission to the legislature. Suggestions for changes were made, some of which the legislature adopted.[143]

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[133] Alexander & Steffey, *supra* note 104, at 517. According to Len Blackwell, the commission was to be "a blue ribbon committee consisting of lawyers and judges who will act as a 'think tank' and produce recommendations for court reform that will carry us into the 21st century." *Id.*

[134] *Id.* at 517.

[135] *Id.* at 548-49.

[136] *Id.* at 548.

[137] *Id.* at 544-46.

[138] 1991 MISS. SUP. CT. ANNUAL REP. iv-ix.

[139] *Id.* at viii.

The Commission on the Courts in the Twenty-first Century determined early in its existence that Mississippi should have an intermediate appellate court.[144] It is not my purpose to restate the route traveled to reach the decision, as that already appears in the published report. Instead, I wish to emphasize one part. Under the chairmanship of Amy Whitten, the appellate court subcommittee of the commission proposed a plan similar to the "deflective" system used in several states, most specifically in Iowa.[145] The basic idea of a deflective system is that a state's highest court continues to have all appeals from trial courts filed with its clerk.[146] Through a screening process, a decision is then made as to which cases the highest court will retain and which will be sent to the intermediate court. In this way, the answer is made to the reasonable question posed by Representative Sonny Meredith and many others—"You've got nine people right now who can't handle it.

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[140] Alexander & Steffey, *supra* note 104, at 549. Other supreme court members studied the appellate systems of Texas and Oklahoma. *Id.*

[141] *Id.* at 550. The chairman of the Judiciary Committee, Mike Mills, sponsored and introduced the legislation. *Id.*

[142] *Id.* at 517-20. The Conference of Mississippi Judges unanimously endorsed the legislative plan. *Id.* at 550.

[143] Interview with Justice Fred Banks, Mississippi Supreme Court Justice, in Jackson, Miss. (Jan. 5, 1996).

[144] Alexander & Steffey, *supra* note 104, at 529-30. The Commission never considered expanding the Mississippi Supreme Court to be a viable option. *Id.* at 530.

[145] *Id.* at 530-32.

[146] *Id.* at 532-33.

How can you expect six to do it?"[147] The way was to divide the case load, not to shift all or most to a lower court. This flexible assignment of cases is a system adopted in ten states, and in fact has been the preferred system in states that have created intermediate courts in the last two decades.[148] It was this system, and Iowa the particular model, that Chief Justice Roy Noble Lee determined to be the best approach, a decision with which the supreme court itself concurred.[149]

In 1993 the new Chief Justice, Armis Hawkins, gave his own state of the judiciary speech to the legislature. The speech was widely quoted on the issue of an intermediate appellate court, especially his dramatic phrase that the case load was a situation "begging for catastrophe."[150] The bill backed by the chief justice and the Commission on Courts in the Twenty-First Century would have created a ten-judge court, the first judges to be appointed by the governor to serve until the general election in 1994.[151] During the 1993 session State Bar President Grady Tollison was an indefatigable advocate for the entire judicial branch reform package. With Senate Judiciary Chairman Hainon Miller and House Judiciary Committee Chairmen Mike Mills and Ed Blackmon strongly supporting creation of a court of appeals, somewhat different bills passed each house.[152] A conference committee met in March 1993 to resolve differences in the bills passed by each house, and agreed on a proposal for a five-judge court appointed by the governor. The senate by a twenty-four to sixteen vote made it clear that they wanted the appointive provision removed and requested further negotiations.[153]

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[147] Pettigrew-Kraft, *Controversy*, *supra* note 114, at B4.

[148] Thomas B. Marvall, *The Effectiveness of Flexible Assignment of Appeals Between Supreme and Intermediate Courts*, 78 JUDICATURE 292, 293 (1995).

[149] Interview with Justice Mike Sullivan, Mississippi Supreme Court Justice, in Jackson, Miss. (Jan. 5, 1996).

[150] 1992 MISS. SUP. CT. ANNUAL REP. viii; *see also* Beverly Pettigrew-Kraft, *State's High Court 'Begging for Catastrophe,'* CLARION-LEDGER (Jackson, MS), Mar. 25, 1993, at B1 (stating "[w]e have caught some grievous mistakes caused . . . from taking [on too many] cases. Even more deplorable are those many errors we may not have caught.").

[151] Alexander & Steffey, *supra* note 104, at 533. Permitting the governor to appoint the new judges, who then would have to run in the next election, was similar to what both the 1916 and 1952 legislatures did in providing for the initial filling of the three new supreme court justice posts that were created in those years. *See supra* notes 71, 90 and accompanying text.

[152] Alexander & Steffey, *supra* note 104, at 550-51.

The final legislation created a five-judge court, with one judge elected from each congressional district after party primaries and a general election in 1994.[154] The idea of election from congressional districts was the brainstorm of Representative Ken Stribling, who suggested those districts since their boundaries were already approved under the Voting Rights Act.[155] That fact presumably prevented district boundaries for the new court from becoming a serious hurdle for approval. The governor signed this legislation and it was then submitted to the Justice Department for preclearance under section five of the Voting Rights Act.[156] As a result, the court would not begin operating until twenty-one months after the legislature adopted this legislation.

Twenty-one months was too long for the matter to be left alone. In the 1994 legislative session, the legislature doubled the size of the court to ten judges.[157] All judicial elections, from trial courts to the supreme court, were made nonpartisan.[158] This legislative session created fourteen new trial judgeships.[159] Again, until the Justice Department's Civil Rights Division precleared the legislation under the Voting Rights Act, these changes could not be effective.[160] Thus candidates—not just for the court of appeals, but for all judgeships—had to make dual filings in 1994. The first filing was to declare with a political party to be a candidate in its June 7th primary; that filing deadline was April 8th. The second and alternative filing had to be made with the secretary of state by May 6th, for the nonpartisan process that was contingent on Justice Department preclearance. Until the Justice Department precleared the statute, there was no statute in force and no formal filings could be made by candidates. On April 6, the same day the governor signed the new statute, the secretary of state's office accepted but did not process its first filing from a candidate under the nonpartisan scheme.[161] Each court of appeals candidate had to decide for which of two posts in the relevant district he or she would file. Those who learned first that the secretary of state was accepting these informal filings might file for the post with the longer initial term. Subsequent candidates then had to determine whether to file against that person, or for the other post—even nonpartisan campaigns have a considerable ingredient of normal political decision making.

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[153] *Lawmakers OK Intermediate Court*, CLARION-LEDGER (Jackson, MS), Mar. 31, 1993, at B3.

[154] Act of Apr. 15, 1993, ch. 518, §§ 1, 3, 1993 Miss. Laws 654, 654-55, 656 (codified at MISS. CODE ANN. § 9-4-1 (Supp. 1995)).

[155] Alexander & Steffey, *supra* note 104, at 548. Representative Stribling's suggestion to use the congressional districts prevented what would have ben a fight over where the district lines should be drawn. *Id.*

[156] This legislation was given preclearance by the Justice Department on July 13, 1993. MISS. CODE ANN. § 9-4-1 note (Supp. 1995).

[157] Act of Apr. 6, 1994, ch. 564, § 97, 1994 Miss. Laws 809, 837-38. The Act provided that there would be two appellate judges from each congressional district. *Id.* at 838.

[158] Act of Apr. 6, 1994, ch. 564, § 78, 1994 Miss. Laws 809, 931.

[159] Act of Apr. 6, 1994, ch. 564, 1994 Miss. Laws 809.

[160] Act of Apr. 6, 1994, ch. 564, § 103, 1994 Miss. Laws 809, 842-43.

This action by the secretary of state's office was an informal matter without sanction of law and was consequently of uncertain effect. There was concern that May 6th would arrive without Justice Department action.[162] Consequently, Representative Ed Blackmon filed suit in the Circuit Court of Madison County.[163] The secretary of state's office entered an agreed order in circuit court, that it would accept candidate declarations (and $200 checks) until the May 6th contingent deadline, but not process them unless the Justice Department granted approval.[164]

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[161] 1994 Miss. Laws 843. The first filing by any court of appeals candidate was by Gene Fair (Fifth District) on April 6, 1994. "Judicial Candidates Qualifying Under H.R. 1809," Secretary of State's Office Document (May 6, 1994), copy in possession of author.

[162] Beverly Pettigrew-Kraft, *Judgeship Agreement Expected*, CLARION-LEDGER (Jackson, MS), Apr. 28, 1994, at B4 [hereinafter Pettigrew-Kraft, *Agreement*]. Candidates who wished to run faced the May 6 qualifying deadline, but without the Justice Department's approval the positions would be non-existent. *Id.*

[163] Pettigrew-Kraft, *Agreement*, *supra* note 162, at B4. Representative Blackmon brought the case in Madison County because that district was not affected by the redistricting. *Id.*

Three major elements were in the legislative package awaiting Department of Justice approval. The least controversial was increasing the size of the court of appeals from five judges to ten. A second component that did generate controversy was making all judicial elections nonpartisan. Some black leaders, strengthened by a resolution from the state chapter of the National Association for the Advancement of Colored People, opposed nonpartisan elections.[165] The argument as stated by state NAACP president Bea Branch was that "[m]inority voters in this state have traditionally voted for Democratic candidates. When they go in to vote, if they don't see the party next to that person's name, they will be confused, and it will dilute black voting strength."[166] The final element of the package was creating 14 new trial judgeships.[167] One of the principal sponsors of the bill, Representative Ed Blackmon, emphasized that the location of the new judgeships was unrelated to existing caseloads—case statistics were never a meaningful part of the debate—but was designed to form districts in which blacks would likely be elected.[168] Senator Hillman

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[164] Kirksey v. Fordice, CI94-0064, Circuit Court of Madison County, preliminary injunction entered April 28, 1994.

[165] Beverly Pettigrew-Kraft, *Dissension Among Blacks Jeopardizes Redistricting Plan, Official Says*, CLARION-LEDGER (Jackson, Miss.), June 6, 1994, at B1 [hereinafter Pettigrew-Kraft, *Dissension*]. Representative Blackmon believed that protests from these leaders kept the Justice Department from approving the districts. *Id.*

[166] Pettigrew-Kraft, *Dissension, supra* note 165, at B1.

[167] *Legislators Create 14 New Judgeships to Increase Minority Representation*, CLARION-LEDGER (Jackson, MS), Apr. 2, 1994, at B4. Eight new circuit judgeships and six new chancellors were created. *Id.*

[168] *Mississippi Bill to Create 13 Judgeships May Mean More Blacks on Bench*, COM. APPEAL (Memphis, TN), Mar. 11, 1994, at A9; *see also* Gina Holland, *Briggs Votes to Strip Judgeships from Bill*, CLARION-LEDGER (Jackson, MS), Mar. 6, 1994, at B1 (stating that Chairman Mills had to compromise bill by redrawing circuit and chancery court districts sought by Black Caucus); Bill Minor, *Switch to Non-Partisan Judicial Elections Appears Certain*, CLARION-LEDGER (Jackson, MS), Mar. 27, 1994, at G3. Jack Elliott Jr., *Judicial Changes for Miss. OK; Blacks May Benefit*, COM. APPEAL (Memphis, TN), Apr. 2, 1994, at B1 (describing bill as "allow[ing] minorities to put their imprint on the judiciary.").

Frazier supported the creation of the new districts claiming that it was "very important to have a diverse judiciary. Diversity is the strength of this state, and that should carry over to the judiciary."[169] Again, the NAACP president opposed the bill arguing that it "does not create all the available black districts."[170]

A frequently heard explanation for trying to impose this new statute in the middle of an election campaign is that the appropriate authorities in the Justice Department had informally assured backers of the legislation that it would be quickly precleared after being submitted in late April. However, any such assumptions proved invalid as the June 7, 1994 primary loomed without action having been taken by the Justice Department. The possibility that expensive final campaigning in contested primaries would be for naught if the nonpartisan elections were subsequently approved led to a petition for injunction being sought and granted.[171] The supreme court reversed, pointing out the prohibition on injunctions regarding elections.[172] The primaries were held, and still no word. Finally, after one extension of the 60-day deadline for action, the Justice Department precleared the entire legislative package on September 6, 1994, the day after Labor Day.[173]

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[169] *Senate OKs Legislation Raising Number of Judges*, CLARION-LEDGER (Jackson, MS), Mar. 27, 1994, at B5. At the time of the bill's proposal, blacks held four of the forty circuit judgeships and two of the thirty-nine chancellor positions. *Id.*

[170] Pettigrew-Kraft, *Dissension*, *supra* note 165, at B2.

[171] Jerry Mitchell, *Judicial Voting Put on Hold by Chancery Judge*, CLARION-LEDGER (Jackson, MS), May 24, 1994, at B1. *See generally* Jerry Mitchell, *Candidate Asks Court to Proceed with Judgeship Section*, CLARION-LEDGER (Jackson, MS), June 3, 1994, at B1.

[172] *In re* McMillin, 642 So. 2d 1336, 1339 (Miss. 1994). The court wrote that the chancery courts of Mississippi "do not have the jurisdiction to enjoin elections or to otherwise interfere with political and electoral matters which are not within the traditional reach of equity jurisdiction." *McMillin*, 642 So. 2d at 1339. *See generally* Beverly Pettigrew-Kraft, *State Voters to Fill Bench of New Court*, CLARION-LEDGER (Jackson, MS), June 3, 1994, at B1.

[173] Beverly Pettigrew-Kraft, *Justice Says New Judicial Districts OK*, CLARION-LEDGER (Jackson, MS), Sept. 7, 1994, at A1, A7 [hereinafter Pettigrew-Kraft, *Justice*]. The Justice Department specifically approved the process of informal filings by candidates until May 6th, and did not object to having the door shut

Under the partisan election scheme legally in effect until September 6, ten people were running for the five positions.[174] Seven of those ten candidates won after approval of ten positions, while only three judges came from the ranks of the nineteen additional people who learned on September 6th that it was time to start campaigning.[175] In each of the five appellate court districts (identical to the respectively numbered congressional districts), the pair of candidates who prior to September 6 were facing each other for one seat had before the May deadline filed for the two different posts under the nonpartisan procedure.[176] There was some coincidence in that fact as the May 6 filing deadline for nonpartisan elections came before the June 7 primaries that determined the party nominees that would face each other.[177] In the First, Second, and Fifth appellate districts the former party nominees won the two judicial posts in November.[178] Two of the remaining judges elected had lost party primaries but re-entered the contest after the change to nonpartisan elections.[179] One judge had only filed under the nonpartisan scheme.[180] Tardy Justice Department

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on candidates four months to the day before the statute became effective with preclearance. Letter from Deval Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Michael P. Mills, future Mississippi Supreme Court Justice, (Sept. 6, 1994) (on file with author).

[174] Pettigrew-Kraft, *Justice*, *supra* note 173, at A1.

[175] *Id.* Ultimate winners Judges Coleman and McMillin (First District), Fraiser and King (Second District), Diaz and Thomas (Fifth District), and Southwick (Fourth District) would have been on the November 1994 ballot even without approval of nonpartisan elections. The information that there were nineteen new candidates, and that five dropped out before the November election, is from the Elections Division, secretary of state's Office.

[176] "Judicial Candidates Qualifying Under HB 1809," secretary of state's Office document (May 6, 1994), copy in possession of author. *See also* Gina Holland, *Coleman and Snowden Win in Judicial Runoffs,* VICKSBURG EVENING POST, June 29, 1994, at A5.

[177] In the Fourth Appellate District, only one person was running in each party's June 7th primary. In the other four appellate districts, however, there were multiple candidates in at least one party's primary.

[178] *See supra* note 176 and accompanying text.

[179] Judges Bridges and Payne had lost their party primary to Greg Snowden of Meridian, but neither Snowden nor the winner of the other Third District party primary, Edmund Phillips, Jr. of Newton, was successful after the election was held under the nonpartisan statute.

[180] Judge Barber did not file for nomination in a party primary. Under the

preclearance, just two months before the election, created a distinct (but not always insurmountable) disadvantage for the candidates who had filed under the nonpartisan scheme, but who had not participated in or had lost a party primary and thus had been on the sidelines at least since June.

The labor of countless people, too few of whom have been mentioned here, made the new court of appeals possible. Certain people will be highlighted since they were on the field when victory was won. First is former Chief Justice Roy Noble Lee, whose vision was mixed with vigor, or even vinegar when that was useful, whose knowledge of the need was matched by the ability to marshall resources of people and publicity and persuasion. His successor Armis Hawkins was equally tireless, and carried the issue to successful conclusion three months after Chief Justice Lee's retirement. The chairmen of the two principal committees who considered the issue, Senator Hainon Miller and Representative Mike Mills, were critical in converting their individual support into a majority of each house. Finally, almost as a bridge between the two justices and the two legislators, State Bar President Grady Tollison was the Bar leader who, through his energy, brought the labors of several of his predecessors to fruition. Each stood on the shoulders of others. Each was in the right place at the right time with the right skills to help create the Mississippi Court of Appeals.

III. STATUTES AND RULES RELATING TO THE COURT OF APPEALS[181]

What follows is a description of the governing statutes and some applicable appellate rules for the new court. The only of-

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nonpartisan election procedures, he defeated one of the former party nominees in the Fourth District, Bobby DeLaughter of Jackson. Assistant District Attorney DeLaughter has the rather unique consolation of likely being portrayed by Alec Baldwin in a movie based on his re-prosecution of the 1963 murder of state NAACP leader Medgar Evers. *Alec Baldwin Interested in Evers Film,* COM. APPEAL (Memphis, TN), Dec. 8, 1995, at E9.

[181] The prominent treatise on supreme court practice has been updated to include the changes resulting from creation of the court of appeals. Luther Munford, MISSISSIPPI APPELLATE PRACTICE (1995).

fice space provided for the court is in the city of Jackson, but there is a provision for the court to hear cases in "such other locations within the state as the supreme court may determine by rule."[182] No circuit riding occurred in 1995, as there was as yet no supreme court rule nor an appropriation covering expenses of that option. All ten judges began service on January 3, 1995.[183] The eventual term for each position is eight-years.[184] However, the first terms of six of the original judges expire in less than eight years so that the offices of not more than a majority of the judges are vacant at any one time.[185] By statute the posts of three of the judges were for initial four year terms, three are for six years, and the remaining four are for full eight-year terms.[186] The chief justice of the supreme court appoints the chief judge of the court for a four-year term, with the chief judge then eligible for reappointment.[187] Chief Justice Hawkins named John J. Fraiser, Jr., as the first Chief Judge.

The supreme court prescribes rules for the assignment of cases to the court.[188] The selection criteria for the assignment of cases is thus within the supreme court's authority, except that it must retain all cases imposing the death penalty and all cases "involving utility rates, annexations, bond issues, election contests, or a statute held unconstitutional by the lower court."[189] The court's decisions on assignment are final and only subject to supreme court review by writ of *certiorari*.[190] However, at any time prior to the court's final decision, the supreme court may, by order, transfer any case pending before the court to the supreme court.[191] Once an assignment is made, the Clerk notifies the parties by a copy of the assignment order.[192]

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[182] MISS. CODE ANN. § 9-4-11 (Supp. 1995). The Code also provides that there shall be offices that are convenient to the State Law Library. MISS. CODE ANN. § 39-4-11 (Supp. 1994).

[183] MISS. CODE ANN. § 9-4-5(1) (Supp. 1995) The judges began service on the first Monday of January, 1995. *Id.*

[184] *Id.*

[185] *Id.* § 9-4-5(2)(a). The first terms to end will expire on January 1, 1999. *Id.* § 9-4-5(2)(a)(i), (iii), (iv).

[186] *Id.* § 9-4-5(2)(a). Judges Coleman, Payne, and Southwick have four-year initial terms; Judges Bridges, King, and Thomas are serving initial six-year terms. *Id.*

[187] MISS. CODE ANN. § 9-4-3(1) (Supp. 1995). The reappointment of the chief judge for the court of appeals is subject to the discretion of the chief justice. *Id.* § 9-4-7(3).

[188] MISS. CODE ANN. § 9-4-3(1) (Supp. 1995). The court of appeals does have jurisdiction to issue writs of *habeas corpus, quo warranto, mandamus, certiorari,* and prohibition. *Id.* § 9-4-3(3).

One criminal defendant contested assignment of his case to the court of appeals, arguing in a motion that the court of appeals was unconstitutional as not being an "inferior court" that the legislature could create.[193] The supreme court pulled the case back in order to consider the motion.[194] The supreme court held that the court of appeals was most certainly inferior, limiting its use of the term, it is hoped, to the constitutional significance of that word.[195] The supreme court reiterated a position first taken in 1840, finding that the word "inferior" in this context did not mean a legislatively-created court had to be subordinate to every other court named in the constitution; it was sufficient that it was inferior to the state's highest court.[196]

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[189] *Id.* § 9-4-3(1); *see also* MISS. R. APP. P. 16(b) (stating areas excepted from review by court of appeal).

[190] *Id.* § 9-4-3(2). Four votes of supreme court justices are necessary to grant *certiorari* review. *Id.*

[191] *Id.* § 9-4-3(2); *see also* MISS. R. APP. P. 16(c) (providing for transfer of case to expedite disposition).

[192] MISS. R. APP. P. 16(d).

[193] Marshall v. State, 662 So. 2d 566, 567-68 (Miss. 1995). The Mississippi Constitution the legislature is permitted to create "such other inferior courts as may be necessary. . . ." MISS. CONST. of 1890, art. VI, § 172.

[194] *Marshall*, 662 So. 2d at 567. The defendants relied upon Harden v. State, 460 So. 2d 1194, 1200 (Miss. 1984), where the supreme court stated "any person who feels aggrieved at a lower court decision has an absolute right of appeal to [the supreme court]," for their argument that they have an absolute right of appeal to the supreme court, not the court of appeals. *Id.* at 568.

[195] *Id.* at 572. The court also acknowledged that there were, prior to this time, no constitutional challenges to the existence of the court of appeals. *Id.*

[196] Id. at 569 (citing Thomas v. State, 6 Miss. (5 Howard) 20, 28 (1840)). In addition, the court examined the historical definition of the term "inferior" with regard to courts of equity. *Id.* (citing Houston v. Royston, 8 Miss. (7 Howard) 543 (1843)).

The court of appeals must issue a decision in every case which it hears that is filed on or after July 1, 1998, within 270 days after the lawyers have filed their final briefs.[197] The supreme court has the same mandate for the cases it retains and a 180-day mandate for cases it receives on *certiorari* to the court of appeals.[198]

Much of the administrative structure and personnel of the supreme court are shared with the court of appeals, including administrative policies and procedures such as docket control of the court's cases.[199] The policies adopted and approved by the administrative office of the courts govern the court's appointment of personnel.[200] The clerk of the supreme court serves as the clerk of the court of appeals and keeps the court's records.[201] The court, by rule, decides cases by sitting *en banc* or in panels of no fewer than three judges.[202] In practice, this has meant that a case is first heard and an opinion written by a three-judge panel. Then the remainder of the ten judges review the opinion. Among other procedural rules, the supreme court prescribes the rules for the submission of cases to the court's panels.[203] The chief judge assigns judges to panels so that "each judge [sits] a substantially equal number of times with each other judge.[204] The chief judge presides over the panel on which he sits, and he has appointed two presiding judges for the panels on which he is not a member.[205] Billy

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[197] MISS. CODE ANN. § 9-4-3(4) (Supp. 1995). Prior to July 1, 1998, the court of appeals must simply issue a decision in an expeditious manner. *Id.*

[198] *Id.* § 9-4-3(5). The 180-day and 270-day time limits do not go into effect until July 1, 1998. *Id.*

[199] MISS. CODE ANN. § 9-4-7(1) (Supp. 1993). All employees of the court of appeals, including staff attorneys and law clerks, are of the same grade classification as similar employees of the supreme court. MISS. CODE ANN. § 9-4-13(2) (Supp. 1995).

[200] MISS. CODE ANN. § 9-4-7(2) (Supp. 1995). When possible, employees of the supreme court will also serve the court of appeals. *Id.*

[201] *Id.*

[202] MISS. R. APP. P. 24. Rule 24 codifies the longstanding practice of the Mississippi Supreme Court. *Id.* cmt.

[203] MISS. CODE ANN. § 9-4-9 (Supp. 1995).

[204] *Id.*

[205] *Id.*

Bridges and James Thomas, the only members of the court who had previously served as elected judges, were named.

The Mississippi Rules of Appellate Procedure became effective January 1, 1995, pursuant to section 9-4-1 *et seq.* of the Mississippi Code.[206] The supreme court promulgated the rules to govern its own procedure as well as that of the court of appeals.[207] Although the rules are similar to the former supreme court rules which they were modeled after, there are several important changes and additions that were needed as a result of the court's creation, including the publication and writing of judicial opinions and *certiorari* review.[208]

The court must express all of its decisions in writing.[209] The clerk of the supreme court enters a judgment upon receipt of the opinion and judgment of the court.[210] However, the opinions written in the first year of the court's operation were not designated for publication.[211] After the first year, the supreme court was to prescribe rules pertaining to the precedential effect and the publication of the court's opinions.[212] Citation, quotation, or reference to opinions that are not designated for publication by or to any court is proscribed, except in continuing or related litigation of an issue.[213] For example, res judicata necessarily requires reliance upon the court's decision.[214] It may be significant that there is no prohibition of citing an opinion to an administrative agency.[215]

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[206] In the Matter of the Adoption of Mississippi Rules of Appellate Procedure, Order No. 89-R-99027 (Dec. 15, 1994), 644-647 So. 2d (Miss. cases) at XXI.

[207] *Id.*

[208] MISS. R. APP. P. 35-B(a). "Portions of Rule 35 dealing with written opinions are based upon former rules of the [s]upreme [c]ourt." MISS. R. APP. P. 35-B cmt. to Rules 35-A and 35-B.

[209] *Id.* "Rule 45(c) governs furnishing of copies of the court's opinions and judgments by the clerk." *Id.* cmt. to Rules 35-A and 35-B.

[210] MISS. R. APP. P. 35-B(c). Entry of judgment is final, however, once it is noted in the minute book of the court of appeals. *Id.*

[211] MISS. R. APP. P. 35-B(a).

[212] *Id.*

[213] MISS. R. APP. P. 35-B(b). Those opinions that are "not designated for publication" are filed in the clerk's office. *Id.*

[214] *Id.* Rule 35B-(b) also lists collateral estoppel and law of the case as significant considerations. *Id.*

[215] The author wishes to thank Professor John Robin Bradley of the University

Considering the numerous appeals from agencies that the court of appeals has received, such as the Workers' Compensation Commission and the Mississippi Employment Security Commission, the issue of citing cases to them has some importance.[216] The clerk files the non-published opinions as public records, and the opinions are listed in the Southern Reporter by case number, style, date and disposition.[217] LEXIS and WESTLAW have both created files for computer access to court of appeals decisions, but the databases contain only the basic case data that appears in the Southern Reporter, not the text of the opinions. The file in LEXIS is named "MSAPP." We are indeed an inferior court.

For practitioners, perhaps the most important addition to the rules governing post-court of appeal procedure is Rule 17.[218] Under this rule, the supreme court afforded itself with a mechanism to review decisions of the court of appeals via the writ of *certiorari*.[219] A party wishing to seek *certiorari* must first file for rehearing in the court of appeals; within fourteen days following the denial of a petition for rehearing, the supreme court will entertain a petition for writ of *certiorari*.[220] While the court will permit a ten-page petition, the rules proscribe briefs and oral argument on the petition.[221] The court will permit responses by opposing parties.[222] The supreme court has required of itself to act upon the petition within sixty days of its filing; otherwise, the petition is automatically denied.[223] The decision rendered on a petition is final.[224] The

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of Mississippi School of Law for pointing out this issue to him.

[216] In 1995 the court of appeals resolved 34 appeals from the Workers' Compensation Commission, and 27 appeals from other administrative agencies. 1995 *Court of Appeals Annual Report* (forthcoming Feb. 1997).

[217] MISS. R. APP. P. 35-B(b).

[218] The rules were adopted effective January 1, 1995. MISS. R. APP. P. 17.

[219] MISS. R. APP. P. 17(a). The writ is described as "not a matter of right, but a matter of judicial discretion." *Id.*

[220] MISS. R. APP. P. 17(b). The petitioner is required to file an original and an extra ten copies of the petition. *Id.*

[221] MISS. R. APP. P. 17(b)-(c). Under sub-section (i), the supreme court may require oral argument. MISS. R. APP. P. 17(i).

[222] MISS. R. APP. P. 17(d). The opposing party has seven days after the filing of the application of *certiorari* to respond. *Id.*

[223] MISS. R. APP. P. 17(e). The supreme court, however, may also decide that a

mandate of the court of appeals is stayed until the court denies the petition.[225]

Four members of the supreme court must agree to grant a petition for *certiorari* before the case will be tendered to the court for review.[226] The rules provide that "substantial questions of law of general significance" will ordinarily be the only issues subject to its *certiorari* review.[227] When such issues are presented, the rules provide that they will usually be considered if the court's decision "appears" in conflict with supreme court authority, a controlling constitutional provision has not been considered by the court in rendering its decision, or where cases should properly have been decided by the supreme court in the first place either on issues requiring decision by the supreme court or on issues involving "fundamental issues of broad public importance."[228] If *certiorari* is granted, the parties are permitted to file supplemental briefs and the supreme court itself may require such supplemental briefing.[229] In granting *certiorari*, the supreme court may limit the issues it considers—notwithstanding the issues presented by the petition.[230]

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petition for *certiorari* was improvidently granted and deny the petition on that basis. MISS. R. APP. P. 17(f).

[224] MISS. R. APP. P. 17(f). "Neither an acceptance nor a rejection of a petition for certiorari shall be subject to further pleading by a party for rehearing or reconsideration." *Id.*

[225] MISS. R. APP. P. 17(j). Upon denial of the petition, the supreme court will issue a mandate pursuant to MISS. R. APP.P. 41. *Id.*

[226] MISS. CODE ANN. § 9-4-3(2) (Supp. 1995); MISS. R. APP. P. 17(a). Rule 17 also contains a nonexhaustive list of situations in which review will be granted by the supreme court. MISS. R. APP. P. 17(a).

[227] MISS. R. APP. P. 17(a).

[228] MISS. R. APP. P. 17(a)(1)-(3).

[229] MISS. R. APP. P. 17(h). The supreme court will review "the record and briefs previously filed in the [c]ourt of [a]ppeals and on any supplemental briefs filed" when considering the petition of *certiorari*. *Id.*

[230] *Id.* The supreme court may request briefs in support of the petitions in order for them to be accepted. MISS. R. APP. P. 17(c).

IV. THE STATISTICS, THE JUDGES, AND A SAMPLING OF IMPORTANT DECISIONS

A judge is the public official whose profile must be the lowest, whose actions in and out of office are by ethical rules to be the epitome of discretion. For the first year of the Mississippi court of appeals, even judicial opinions were discrete, i.e., they could neither be published by West nor cited by litigants.[231] The following review is intended to reduce the anonymity of the judges and some of their most important work of 1995.

The first year of the court's existence began January 3, 1995. In the ornate courtroom where the supreme court once heard oral arguments, all nine supreme court justices, the governor, lieutenant governor, and many other dignitaries honored the new court of appeals judges by joining them for the investiture. The mixture of excitement and novelty was captured by Chief Justice Armis Hawkins when he opened the ceremony by saying "Welcome to the Christening of ten little baby judges." The court was indeed an infant, as it was born at those proceedings when the ten judges gave it life by taking office. The Chief Justice during the charge he gave to the court later in the ceremony was more solemn:

> This day is not what is important . . . . What is important is the job you are to perform in that building up the street. Business, commerce and industry, men, women, and children, from every segment of society, caught in mankind's misery will bring serious and dreadful problems before you for ultimate solution. You and you alone must decide their fate, and in every decision you yourself will be on trial.[232]

Part of the evidence that will support a verdict on the merits of the court of appeals is the extent to which it has reduced the denial of justice that comes from inordinate delay. During its first year, the court of appeals decided 535 cases, all with written opinions.[233] After completing selection of staff and engaging in other start-up essentials, the judges handed down their first opinions on February 7, 1995. The next hand-down was on March 7, 1995. Since that time cases have been announced every two weeks except during July. Starting in September 1995, the court has been authorized to use a short opinion style. In criminal appeals in which the weight and sufficiency of the evidence are the issue, or any other similarly simple issue in a criminal or civil case, there is often no benefit to the parties in explaining in detail the reasoning of the court. These *per curiam* opinions are usually two pages or less in length, must be unanimous, can only be used for affirmances, and only deal with one or two issues with well-developed precedents.

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[231] MISS. R. APP. P. 35-B(a)-(b).

[232] Armis Hawkins, Address at the Inaugural Investiture of the Mississippi Court of Appeals (Jan. 3, 1995) (on file with author).

The subject matter has covered the gamut of assignable cases.[234] Fifty-six percent of the cases decided in 1995 were criminal appeals, including convictions for murder, assault, rape, driving under the influence, and most other crimes. Workers' compensation appeals took up seven percent of the cases, while all other administrative agency appeals amounted to six percent. The remainder of the appeals was an assortment of civil matters, with the only categories amounting to two percent or more of the docket being domestic relations (five percent), personal injury cases (four per cent), real property (three percent), and estates (two percent). Some of the appeals were from final judgments entered as long ago as 1990. Near the end of the year, many more 1995 appeals were considered as the 270-day appeal clock was running on those cases filed after January 1, 1995, and which were fully briefed.

The backlog of the court is largely a function of the pace by which the supreme court assigns cases. At the end of the year, decisions in 355 cases deflected to the court were pending.[235] The best measure of the finality of the court of appeals' decisions is that, during 1995, only five petitions for *certiorari* were granted. One of those was subsequently dismissed as being improvidently granted.[236]

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[233] 1995 MISS. SUP. CT. ANN. REP. 43-45.

[234] *Id.*

[235] Figure provided by supreme court clerk.

Those are the big picture numbers. A more refined view is possible by looking at a sampling of significant cases decided by each judge. With some help from individual judges, two key decisions for each member of the court were selected. Most of these twenty would have provided guidance in the interstices left by supreme court case law, which is the function of precedents for any court with publishing authority. Many, if not most, of the 535 cases decided would not have been of help to the bench or bar, but most of these twenty are illustrative of those that are. Though the court is primarily intended to be an error correction court-applying established law to given facts and bringing lower court decisions in line with that authority where necessary-in fact there are often issues of first impression that must be addressed.

The following is a biographical sketch[237] of each judge, immediately followed by two of that judge's opinions.[238]

Chief Judge John J. Fraiser, Jr. Born August 10, 1925, in Minter City. Attended Delta State and Mississippi State Universities. Decorated for service in the Army Air Corps in World War II, as a crew-member on a bomber in the Pacific theater. Graduated from University of Mississippi (J.D. 1948). Private law practice in Greenwood from 1948-1990; Leflore County Attorney 1949-70; state senator 1976-1983 (chairman, Committee on Universities; vice-chairman, Judiciary Committee); Mississippi Supreme Court Magistrate 1990-1994.

Fraiser opinions: *Byars v. Wal-Mart Stores, Inc.*[239] contains a thorough review of Mississippi's law on *res ipsa*

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[236] 1995 MISS. SUP. CT. ANN. REP. 41.

[237] The biographical information that follows was compiled from information supplied by Judy Lacy, Assistant Administrator for the Mississippi Court of Appeals (on file with the Mississippi Law Journal).

[238] Unpublished opinions of the court of appeals have been compiled by Research and Reporting Services, P.O. Box 703, Florence, MS 39073-0703, (601) 845-1935, (800) 845-1937.

[239] No. 93-CA-00192, slip op. at 1-5 (Miss. Ct. App. Sept. 5, 1995) (Fraiser, C.J., concurring).

loquitor.[240] *Suddeth v. Thomas Trucking, Inc.*[241] considered a wrongful death action in which the duty of a driver in the presence of children was examined.[242]

Judge Frank D. Barber: Born April 2, 1929, and raised in Hattiesburg and Laurel. Active duty, Regular Army and Mississippi National Guard, recalled to active duty with the latter during Korean War. Attended University of Mississippi and University of Southern Mississippi (B.A. 1954). The George Washington University (LL.B. and J.D. 1957). Staff attorney, Subcommittee on Internal Security, U.S. Senate Committee on the Judiciary, 1955-58; State senator 1960-64; Executive Assistant, Gov. Paul B. Johnson, Jr. 1964-68; Legislative assistant to U.S. Senator James O. Eastland, 1972-78. Private practice in Hattiesburg and Jackson; Secretary of Mississippi Senate 1989-91; Special Assistant Attorney General, Mississippi, 1992-94.

Barber opinions: *Strangi v. Strangi*[243] was a divorce case with a variety of issues. Its principal significance is that it may have been the case that had waited on appeal the longest (forty-four months) of any decided by the court, and was resolved within thirty days of being assigned. In *Kennedy v. State*,[244] a burglary conviction was affirmed after the court rejected a *Miranda* argument that the defendant's statements were involuntary due to pain from injuries suffered during the crime and the effect of medication for the pain.[245] Ineffective assistance of counsel and constitutional speedy trial claims were also found unpersuasive.[246]

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[240] *Byars*, slip op. at 1-6 (Fraiser, C.J., concurring). In Mississippi, the application of *res ipsa loquitor* creates only the inference of negligence, and does not shift the burden of proof to the defendant. *Id.* (Fraiser, C.J., concurring).

[241] No. 93-CA-00032, slip op. (Miss. Ct. App. Sept. 19, 1995).

[242] *Suddeth*, slip op. at 6-8. The court stated that drivers are to expect that children may do the unexpected and unpredictable. *Id.*, slip op. at 6 (citing McGee v. Bolen, 369 So. 2d 486, 492 (Miss. 1979)).

[243] 662 So. 2d 187 (Miss. Ct. App. 1995) (mem.).

[244] No. 92-KA-01052, slip op. (Miss. Ct. App. May 16, 1995).

[245] *Kennedy*, slip op. at 7-9. The defendant further claimed that the police threatened him and promised leniency in exchange for information. *Id.*, slip op. at 8.

[246] *Id.*, slip op. at 9-14. Even though the defendant was tried sixteen and a half months after his arrest, he was unable to show prejudice from the delay. *Id.*

Presiding Judge Billy G. Bridges: Born May 5, 1934, in Simpson County. Veteran of Korean War, serving in the Marine Corps. Hinds Community College (1954); University of Mississippi (B.B.A. 1958, J.D. 1961). Judge Bridges served as board attorney for, among other entities, municipalities of Florence and Pelahatchie. He was Rankin County Prosecuting Attorney, 1971-74; district attorney 1975-77, and chancery judge 1977-1990. Judge Bridges served as a Supreme Court Commissioner in 1978.

Bridges opinions: *Suarez v. Ford Motor Co.*[247] interpreted section 15-1-65 of the Mississippi Code, the "borrowing statute," which applies another state's limitation statute if a cause of action brought in this state actually accrued in another state. The court found that negligence claims arising from a Georgia car accident were time-barred by the applicable Georgia statute, but that a breach of warranty claim was separate and governed by Mississippi law because the vehicle was purchased in this state. *Dent v. State*[248] was a business burglary conviction in which the court found that the entry necessary for conviction was proved by testimony that the alarm that went off would be triggered only by an opening of the door, not just by breaking of window glass. Identity of the perpetrator was circumstantially proved by a security guard's testimony: even though he never saw the burglar's face, the witness recognized the unusual clothes worn by the culprit as the same as those of the defendant, who was seen walking two blocks away shortly after the incident.

Judge Thomas A. Coleman: Born May 14, 1941, in Grenada. Graduated University of Mississippi (B.A. 1962, L.L.B. 1964). Active duty, U.S. Army, 1964-66. Private practice in Ackerman, 1966-92, except for two years in Jackson, and while serving as district attorney, Fifth Circuit Court District 1972-76; Supreme Court Administrator 1992-93. Judge Coleman was the only court of appeals judge to win a three-way race in November 1994 without a runoff.

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[247] No. 93-CA-00970, slip op. (Miss. Ct. App. June 27, 1995)

[248] 662 So.2d 207 (Miss. Ct. App. 1995) (mem.).

Coleman opinions: *Greenwood Public School District. v. Hurt*[249] held that a school district could not release any personnel records of a former school teacher under section 25-61-1 of the Mississippi Code without that teacher being given an opportunity to participate in the proceedings; this was a procedural matter, and there was no holding that a teacher had a compelling privacy interest in the specific documents—absentee records.[250] In *Brown v. State*,[251] a case involving an armed robbery conviction, the court upheld the cross-examination of a defendant by the State concerning gaps in a story he had previously given, finding it not to be a violation of the right against self-incrimination.[252]

Judge Oliver E. Diaz, Jr.: Born December 16, 1959, in Biloxi. Gulf Coast Junior College, University of South Alabama (B.A. 1982); University of Mississippi (J.D. 1985). Private law practice, Gulfport, 1985-94; State representative, 1988-94 (secretary, Constitution Committee; subcommittee: chairman, Insurance Committee and Judiciary Committee; Ways and Means Committee); City attorney, D'Iberville 1991-94.

Diaz opinions: *McGraw v. State*[253] was an aggravated assault conviction. After a mistrial was declared in August, the defendant immediately moved for reconsideration of his motion for directed verdict that had been made during trial.[254] The trial court in November granted the directed verdict, but then the next day withdrew the order and the defendant was retried and convicted.[255] The court of appeals held the directed verdict was void as beyond the trial court's authority once the mistrial was declared.[256] The court found that no double jeopardy problem arose from the second trial. In *Clay v. Boozer*,[257] the court affirmed a $50,000 jury award in a suit for alienation of affections; the relative rarity of such suits did not mean the cause of action had lost its viability.

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[249] No. 92-CA-01331, slip op. (Miss. Ct. App. Sept. 19, 1995).

[250] *Hurt*, slip op. at 11-12. The former teacher was running for public office, and the appellee requested the teacher's absentee record as a public document. *Id.*, slip op. at 3.

[251] No. 93-KA-00841, slip op. (Miss. Ct. App. June 13, 1995).

[252] *McGraw*, slip op. at 10-11. The defendant, after he was arrested and read his *Miranda* rights, admitted to the arresting officer that he was involved in the robbery. *Id.*, slip op. at 2. The defendant claimed later that because of his young age (18 years) and low level of education (10th grade), he was unable to understand and waive his rights. *Id.*, slip op. at 8. The court rejected this argument, upholding the trial court's determination that the defendant was capable of understanding his rights. *Id.*, slip op. at 11.

[253] No. 93-KA-01431, slip op. (Miss. Ct. App. Oct. 31, 1995).

[254] *Id.*, slip op. at 5.

[255] *Id.* The trial court declared the Order of Dismissal to be "set aside and

Judge Leslie D. King: Born January 17, 1949, in Greenville. Graduated from the University of Mississippi (1970), and Texas Southern University (J.D. 1973). Private practice in Greenville, 1973-94; Youth Court Counselor, 1974-79; Municipal Court Judge, 1981-83; State representative, 1980-94 (vice-chairman of Ways & Means and of Conservation committees; chairman, Mississippi Black Legislative Caucus). Judge King was the only court of appeals judge to be unopposed on the November, 1994 ballot.

King opinions: *In re the Estate of Hamlin*[258] upheld a trial court finding that the presumption of validity of a second marriage was adequately rebutted by proof from several chancery clerk's offices that no divorce from the first marriage had been granted in those counties.[259] The second "wife" therefore could not renounce her "husband's" will and was herself not an heir.[260] *Fort Worth Steel & Machinery Co. v. Harris*[261] interpreted section 15-1-41 of the Mississippi Code, a ten-year statute of repose applying to defects in improvements to real property. The relevant improvements were constructed in 1966 at a time when injuries resulting from latent defects in improvements were excluded from the repose statute; an amendment to the statute in 1972, including latent defects, started running as to existing improvements on the effective date of

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held for naught." *Id.*

[256] *Id.*, slip op. at 8-9.

[257] No. 93-CA-01403, slip op. (Miss. Ct. App. June 27, 1995).

[258] No. 93-CA-00017, slip op. (Miss. Ct. App. Oct. 31, 1995).

[259] *Hamlin*, slip op. at 8, 12. The chancery clerk's officers were located in Madison County, Mississippi, and Reno, Nevada, the only places where the parties had lived. *Id.*, slip op. at 8.

[260] *Id.* at 8-9, 12.

[261] 662 So. 2d 215 (Miss Ct. App. 1995) (mem.).

the amendment, not retroactively to when the improvements had been made. Suit was timely brought on a 1974 injury in 1979.

Judge Roger H. McMillin, Jr.: Born May 28, 1945, in New Albany. Graduated from Mississippi State University (B.A. 1967). Spent two years on active duty with the United States Navy. Graduated from Memphis State University (J.D. 1972). Counsel with U.S. Department of Agriculture, Atlanta, in 1976; private practice, Jackson, 1976-77, then New Albany, 1977-1994; New Albany City Attorney 1982-94; Bar Commissioner, Third Circuit District, 1869-89.

McMillin opinions: In *Jones County v. Smith*,[262] the court held that a public school did not have the statutory authority to expel students for misconduct that did not occur on school premises or on a school bus; this misconduct was during a school-sponsored trip to an out-of-town convention and the statute only provided for less severe discipline. *Delta Oil Mill v. Buelow*[263] analyzed the interrelation of the procedures of section 27-13-43 of the Mississippi Code for contesting a franchise tax assessment, and section 27-13-47 for claiming a refund. The court held that the doctrine of res judicata was invoked by failure to appeal a commission's final order on assessment and the remedy of seeking a refund was unavailable.[264]

Judge Mary Libby Payne: Born March 27, 1932, in Gulfport. Attended Mississippi University for Women, University of Mississippi (B.A. 1954; J.D. 1955). Private practice, Rankin County 1955-68; Executive Director, Mississippi Judiciary Commission, 1968-70; Chief, Drafting and Research, Mississippi House of Representatives, 1970-72; Assistant Attorney General, 1972-75; Professor 1975-95, first Dean, 1975-78, Mississippi College School of Law. Judge Payne emerged victorious from the largest field of candidates any court of appeals judge faced in 1994: five.

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[262] 662 So. 2d 192 (Miss Ct. App. 1995) (mem.).

[263] 662 So. 2d 217 (Miss. Ct. App. 1995) (mem.).

[264] *Delta Oil*, slip op. at 5. By paying the taxes found due in the first suit, and then filing suit seeing a refund, there were two suits with the same subject matter, parties, and underlying cause of action. *Id.*, slip op. at 4.

Payne opinions: *RPM Pizza, Inc. v. Grosinske*[265] upheld the voiding of an covenant not to compete for two years within a two-mile radius signed by a pizza restaurant manager. The covenant was held oppressive to the employee, with unreasonable time and geographic restrictions.[266] *Waites v. State*[267] affirmed a conviction where the defendant was the subject of non-custodial interrogation based on a tip regarding his selling drugs, no *Miranda* warnings were needed even if probable cause to arrest based on the tip existed. The removal from the defendant's pocket of some keys found in a pat-down did not invalidate a subsequent search of a car using the keys, since the suspect denied he owned the car and implicitly consented to its search.

Judge Leslie H. Southwick: Born February 10, 1950, in Edinburg, Texas. Graduated from Rice University (B.A. 1972); University of Texas (J.D. 1975). Law clerk for Presiding Judge John Onion, Texas Supreme Court of Criminal Appeals, 1976-76, and for Judge Charles Clark, U.S. Court of Appeals for the Fifth Circuit, 1976-77. Private law practice, Jackson, 1977-89; Deputy Assistant Attorney General, U.S. Department of Justice, 1989-93.

Southwick opinions: *May v. Board of Nursing*[268] was a reversal of a nursing license revocation because of inadequate evidence. The opinion contains an historical analysis of the changing standards for fact-finding by administrative agencies; the case suggests that the "ultimate fact-finding" now required of agencies is an unfortunate departure from earlier Mississippi case law. *Pearson v. Columbus & Greenville Railway.*,[269] reversed summary judgment for a railroad involved in a grade-crossing accident, and discussed the reach of federal preemption in these sorts of negligence suits.[270]

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[265] No. 93-CA-01147, slip op. (Miss. Ct. App. Aug. 15, 1995).

[266] *RPM Pizza*, slip op. at 6. The court noted that although the covenant not to compete was for two years, a pizza restaurant manager can be trained in six months to a year. *Id.*, slip op. at 4.

[267] 662 So. 2d 205 (Miss. Ct. App. 1995) (mem.).

[268] No. 93-CC-00765, slip op. (Miss. Ct. App. June 27, 1995).

[269] No. 93-CA-01265, slip op. (Miss. Ct. App. Oct. 17, 1995).

Presiding Judge James E. Thomas: Born March 1, 1950, in Columbia, but grew up in Gulfport. University of Southern Mississippi (B.S. 1971); University of Mississippi (J.D. 1973). Assistant District Attorney, 1974-1982; Circuit Judge, 1983-1994, Second Circuit District. Judge Thomas won election in 1994 to the court of appeals by the largest percentage vote of any of the nine with contested races—sixty-nine percent.

Thomas opinions: *Vulcan Materials Co. v. Miller*[271] is the third case in the state appellate system addressing the a certain limestone royalty agreement executed in 1967. This case found the agreement to be a covenant running with the land which would apply to lands not originally described in the agreement, even if the owner did not affirmatively assume the royalty obligation.[272] *Smylie v. State*[273] was a conspiracy to sell cocaine conviction. It was affirmed despite claims the indictment was fatally imprecise when it charged sales on March 13, 1992, "and prior thereto," with the court holding that the specific date gave adequate specificity to the charge. The court also held the appellant had no standing to raise illegal search issues when the search was of a co-conspirator.

CONCLUSION

The reason the court of appeals exists is that it was not possible for one appellate court for the entire state to decide with due deliberation and dispatch (an inconsistent pair of demands) all the appeals before it. The two courts together will have disposed of over 1200 cases in 1995. Assuming the court of appeals will be able to increase its number of dispositions in the future over what it did in its start-up year, it is reasonable to assume that the two courts together can eliminate the backlog within three years and enable parties to have their cases presented to one of the two courts within a matter of a few months after briefing is completed. The complex case will still be delayed in resolution, but it will be a delay caused by deliberation, not by accumulation of other matters.

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[270] *Pearson*, slip op. at 3-18. Federal preemption will apply when "the claimed negligence is based on inadequate warnings of crossings, or excessive speed, or inadequate locomotive lighting." *Id.*, slip op. at 18.

[271] No. 93-CA-00829, slip op. (Miss. Ct. App. Nov. 28, 1995).

[272] *Vulcan Materials*, slip op. at 8-10. The court found that the parties had both actual and constructive knowledge of the royalty obligation. *Id.*, slip op. at 9.

[273] 662 So. 2d 196 (Miss. Ct. App. 1995) (mem.).

Publication of court of appeals decisions has now been addressed, with a supreme court-promulgated rule determining which opinions should be published.[274] There is a frequently

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[274] MISS. R. APP. P. 35B. Effective as of September 1, 1996, the amended rule states, in relevant part:

> (a) **Written Opinions in the Court of Appeals**. The Court of Appeals will write opinions on all cases heard by that court and may publish opinions only on those cases meeting the requirements for publication as set out in Rules 35-B(b) and (c). The Supreme Court shall, after one year, review the rules concerning publication of opinions of the Court of Appeals.
>
> (b) **Standards for Publication**. An opinion of the Court of appeals may be designated for publication only when at least one of the following is satisfied:
>
> (1) The opinion clarifies an existing rule and the matter is not presently pending in a case for review by the Supreme Court; or
>
> (2) The opinion involves a factual situation or a legal issue of broad and/or continuing public interest not addressed in recent Supreme Court opinions; (This criterion shall apply only upon a determination that significant changes in the public perception of the issue suggest the necessity to reaffirm an established rule of law); or
>
> (3) The opinion resolves an apparent conflict of authority and the matter is not presented before the Supreme Court for review; or
>
> (4) The opinion contains a professionally useful, nonduplicative review or summary of existing law on a specific issue or area of law not addressed in recent Supreme Court opinions.
>
> (c) **Authority for Publication**.
>
> (1) By Vote of the Judges of the Court of appeals, Subject to Rule 35-B(b), a three-judge panel of the Court of Appeals will initially vote whether or not to publish its opinions. Any opinion which does not receive a majority vote of the panel in favor of publication will not be published. Where an opinion receives a majority vote of the panel in favor of publication, the opinion will then be circulated with each panel judge's vote noted, to the full court for a final determination on whether to publish the opinion. Upon circulation to the full court, in any instance where there is more than one vote of a participating judge against publication, the opinion shall not be published. Any separate opinions are to be published along with published majority opinions.
>
> (2) Court of Appeals Opinion must be Final. An opinion may be published only after it is final. An opinion of the Court of Appeals is final

stated lament concerning how little case law there is in Mississippi on some issues but, conversely, how replete the casebooks/computer data bases are with cases on some subjects, such as divorce, or weight and sufficiency of criminal evidence. What the court of appeals publishes needs to be part of a coordinated approach to publishing for both courts.

A question to consider is whether the court should remain a creature only of statute, or should its existence be mandated by the constitution? The supreme court has determined there is no legal necessity of inclusion in the constitution,[275] but the desirability of the court's existence being assured by the constitution is another matter.

The Mississippi Bar asked each of the court of appeal judges-elect, in December, 1994, to put into one sentence his or her goal for the court. Those goals were printed in an article about the new court.[276] My goal was that, after a year of service, the court would be perceived by the bench, bar, and average citizen—and there would be substantial evidence to support the perception—as "playing a significant role in improving the quality of justice in Mississippi."[277] Most of the other judges expressed similar statements. That remains the goal for us all in the succeeding years as well.

I will close as did Chief Justice Hawkins in his charge to

> where: (i) no motion for rehearing is filed pursuant to Rule 40; (ii) no petition for writ of certiorari is filed pursuant to Rule 17; (iii) a petition for writ of certiorari is filed and automatically rejected through the failure of the Supreme Court to issue such a writ within 90 days; (iv) a petition for writ of certiorari is filed and denied by order of the Supreme Court; or (v) a petition for writ of certiorari is filed and granted by the Supreme Court but ultimately dismissed as improvidently granted. Where further review is otherwise granted by the Supreme Court, that court shall decide whether the Court of Appeals' opinion shall be published.

Id.

[275] Marshall v. State, 662 So. 2d 566, 572 (Miss. 1995). The court found that "[l]egislatively creating a court of the same type and character as a constitutionally created court is permissible." *Marshall*, 662 So. 2d at 572.

[276] *Mississippi Court of Appeals Meet the Judges*, 41 MISS. LAW. 13, 13-17 (Jan./Feb., 1995).

[277] *Id.* at 16.

the court on January 3, 1995:

> It will be up to you whether your children and grandchildren will remember with profound pride that you once served on this Court and you were the first. Into that vacancy that is the future you are about to make your mark.[278]

The first year of what was then only vacant future has passed. The memories of the marks made upon that year, and on the equally important years ahead, remain to be seen.

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[278] *See supra* note 232 and accompanying text.

A REVIEW OF ISSUES PRESENTED BY § 11-46-11 OF THE MISSISSIPPI TORT CLAIMS ACT: THE NOTICE PROVISIONS AND STATUTE OF LIMITATIONS

J. James Fraiser III[*]

I. INTRODUCTION

This article will examine the present status of section 11-46-11 of the Mississippi Code,[1] the notice of claim and statute of limitations provisions of the Mississippi Tort Claims Act.[2] This review will include an examination of the statutory schemes of sister states which contain similar notice and limitation provisions in their tort claims acts, and the case law interpreting those provisions, in an attempt to anticipate the reaction of the Mississippi Supreme Court to the Act's notice and limitation provisions.

The ancient legal principle that "the King can do no wrong" may have derived from the idea that the king was incapable of thinking wrongly, or from the fact there was no superior English court to that of the king's.[3] However this principle came to prominence, its practicalities were such that the English king enjoyed complete, personal immunity, and no English court could obtain jurisdiction over him without his consent.[4]

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[*] B.A. 1976, J.D. 1979, University of Mississippi; Hinds County Assistant District Attorney, 1980-1982; Private practice, 1983-1994, with emphasis on tort and contract litigation; Mississippi Special Assistant Attorney General, Civil Litigation Division, 1995 to present, responsible for all Tort Claims Act litigation. The opinions expressed in this article are those of the author only and not necessarily those of his employer.

[1] MISS. CODE ANN. § 11-46-11 (Supp. 1995).

[2] *Id.* § 11-46-1 to -23. The Mississippi Tort Claims Act is formally titled "Immunity of State and Political Subdivisions from Liability and Suit for Torts and Torts of Employees." *Id.*

[3] *See* George J. Meyer, Comment, *Sovereign Immunity for Tort Actions in Oklahoma: The Governmental Tort Claims Act,* 20 TULSA L.J. 561, 562 (1985) (discussing history of sovereign immunity). Though no clear meaning for this

Scholars have suggested that the origins of sovereign immunity may be found in English common law,[5] specifically in the decision of *Russell v. Men of Devon.*[6] The *Russell* court ruled that a tort action against the County of Devon would not lie for a variety of reasons including: (1) to permit the action would lead to "an infinity of actions,"[7] (2) no precedent existed for such a suit,[8] (3) only the legislature could impose such liability on the government,[9] and (4) "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."[10]

The first application of the doctrine in the United States may be traced to the case of *Mower v. Leicester,*[11] where a Massachusetts court, citing the *Russell* decision, denied a plaintiff's request for damages to his horse occasioned by a town's unrepaired bridge.[12] The United States Supreme

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maxim exists, some scholars have asserted that it means the king was not allowed to do wrong. *Id.* at 562 n.8.

[4] *Id.* at 562. Even though the king enjoyed immunity, his subjects retained several remedies for wrongs the king committed. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924).

[5] *See* Mary S. Hack, Note, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 MO. L. REV. 743, 746-47 (1993) (discussing history of sovereign immunity). The rationale that "the King can do no wrong" formed the basis for sovereign immunity in the United States. *Id.*; *see* Jones v. Knight, 373 So. 2d 254, 259 (Miss. 1979) (Bowling J., dissenting) (attributing history of governmental immunity to English common law).

[6] 100 Eng. Rep. 359 (1788).

[7] *Russell*, 100 Eng. Rep. at 362. Although the court held that fear of a large number of suits should not alone prevent a plaintiff's recovery, this fear should carry "considerable weight." *Id.*

[8] *Id.* Fear of a large number of suits against the county increased the importance of the lack of precedent. *Id.*

[9] *Id.* The legislature would only impose liability on the county if it were "reasonable." *Id.*

[10] *Id.* The court characterized each individual in the county paying a share of the damages as an inconvenience. *Id.*

[11] 9 Mass. 247 (1812).

[12] *Mower*, 9 Mass. at 248-49. Though the plaintiff argued that the objections

Court later adopted sovereign immunity in the decision of *Cohens v. Virginia*,[13] with no explanation apart from a bald assertion by Chief Justice Marshall that the doctrine was "universally received."[14] However, troubled by the harsh results of their states' persistent adherence to the doctrine of sovereign immunity,[15] that "insurmountable barrier"[16] to an injured citizen's legitimate claim against the state, numerous courts abolished the doctrine in whole or in part with varying justifications.[17] Other state courts chose to wait for legislative pronouncement, and legislative action abolished sovereign immunity in numerous jurisdictions.[18]

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to liability raised in *Russell* were not present, the court held the town was not liable for the conditions of its roads without a showing of negligence. *Id.*

[13] 19 U.S. (6 Wheat.) 264 (1821).

[14] *Cohens*, 19 U.S. at 411-12. Chief Justice Marshall further commented that "the judiciary act [did] not authorize such suits" against governmental entities. *Id.* at 412.

[15] *See* Michael J. Waldspurger, *Ameliorating the Harsh Effects of Wisconsin's Municipal Notice of Claim Statute*, 77 MARQ. L. REV. 610, 627 (1994) (noting severe consequences of aspect of tort claims statute). Strict application of technical statutory requirements have produced inequitable results. *Id.*

[16] Carroll v. County of York, 437 A.2d 394, 400 (Pa. 1981) (Larsen, J., dissenting). The characterization of sovereign immunity as a "barrier" comes from its comparison to "reasonable procedural prerequisites." *Carroll*, 437 A.2d at 400 (Larsen, J., dissenting); *see also* Jaye Bernstein, *Pennsylvania Supreme Court Review, 1981*, 55 TEMPLE L.Q. 643, 648 (1982) (discussing view on sovereign immunity).

[17] Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 460 (Cal. 1961). California's Supreme Court referred to sovereign immunity as "an anachronism, without rational basis [which] has existed only by the force of inertia." *Muskopf*, 359 P.2d at 460. The Colorado Supreme Court opined that sovereign immunity "may be a proper subject for discussion by students of mythology but finds no haven or refuge in this court." Colorado Racing Comm'n v. Brush Racing Ass'n, 316 P.2d 582, 585 (Colo. 1957). The Florida Supreme Court noted that the Revolutionary War forever abolished the notion that "the king could do no wrong." Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957). Washington's Supreme Court simply declared, "We closed our courtroom doors without legislative help, and we can likewise open them." Pierce v. Yakima Valley Mem'l Hosp. Ass'n, 260 P.2d 765, 774 (Wash. 1953).

[18] *See, e.g.*, ALA. CODE §§ 41-9-60 to -74, (1975 & Supp. 1996) (creating Board of Adjustment to hear claims against state); ALASKA STAT. §§ 09.50.250-.300 (1994) (waiving immunity for tort actions); GA. CODE ANN. §§ 36-33-1 to -6 (1993 & Supp. 1996) (limiting immunity to discretionary acts); HAW. REV. STAT. §§ 662-1 to -17 (1993 & Supp. 1995) (waiving state immunity); 705 ILL. COMP. STAT.

As a commentator has previously demonstrated, the road to a partial abrogation of the doctrine in Mississippi was not so cut and dried.[19] The Mississippi Supreme Court demanded the death of sovereign immunity in 1982[20] and the Legislature passed a Sovereign Immunity Act in 1984;[21] however, the doctrine showed no signs of illness until 1992 when the Court in *Presley v. Mississippi State Highway Commission*,[22] essentially declared the stalling aspects of the Legislature's 1984 Sovereign Immunity Act unconstitutional.[23] Finally, in 1993, the Legislature drove the final nails into sovereign immunity's coffin by passing several amendments to the 1984 Act which allowed the statutory waiver of sovereign immunity to take effect.[24]

ANN. 505/8 (West 1992 & Supp. 1996) (giving Court of Claims exclusive jurisdiction over suits against state); IOWA CODE §§ 669.1-.24 (Supp. 1996) (allowing suit against state); NEB. REV. STAT. §§ 81-8, 209 to 81-8, 239.09 (1994) (providing uniform procedures for tort claims against state); NEV. REV. STAT. §§ 41.031-.039 (1996) (waiving immunity for liability and action); N.Y. JUD. § 8 (McKinney 1989) (waiving immunity); ORE. REV. STAT. §§ 30.260-.300 (1988 & Supp. I 1996) (defining scope of liability for actions against state); R.I. GEN. LAWS §§ 9-31-1 to -12 (1956 & Supp. 1995) (specifying limits of state tort liability); TENN. CODE ANN. §§ 29-20-101 to -407 (1980 & Supp. 1995) (removing governmental immunity); TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.003 (West. 1996) (waiving state immunity); UTAH CODE ANN. §§ 63-30-1 to -38 (1993) (describing extent of immunity); VT. STAT. ANN. tit. 12, §§ 5601-06 (1973 & Supp. 1995) (outlining state liability in tort); WASH. REV. CODE §§ 4.92.090-.130 (1988) (allowing state liability in tort).

[19] David W. Case, *From Pruett to Presley: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi*, 63 MISS. L.J. 537, 538-41 (1994). Mississippi went through several complicated stages from 1982 to 1993 in its attempt to define the state of immunity in Mississippi. *Id.*

[20] Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982) (en banc). The court left intact immunity for discretionary governmental functions but abolished sovereign immunity in all other respects. *Pruett*, 421 So. 2d at 1052.

[21] Case, *supra* note 19, at 547. The 1984 Act contained a declaration that the state and its departments and agencies would be immune from tort liability after July 1, 1985. 1984 Miss. Laws 495 (codified at MISS. CODE ANN. § 11-46-1 to -21 (Supp. 1984)).

[22] 608 So. 2d 1288 (Miss. 1992) (en banc).

[23] *Presley*, 608 So. 2d at 1301. The court found unconstitutional the portion of the Act requiring courts to apply Mississippi case law as it existed on November 10, 1982. *Id.* On grounds of public policy, it qualified its ruling to protect those who had not acquired liability policies in reliance on immunity. *Id.*

[24] Case, *supra* note 19, at 564-65. The Mississippi Legislature introduced a

Of the fifteen statutes composing the new Tort Claims Act's current provisions,[25] none are presently generating more legal controversy than the notice of claim provisions[26] and the statute of limitations provisions[27] applicable to all negligence actions against the state, its agencies, political subdivisions and their employees.[28] For instance, one question the courts are now facing is whether the legislature intended, and if the Mississippi courts should require, strict compliance with the notice and limitations provisions. Other pressing questions which, as of this writing, have not been answered by Mississippi's highest court or its newly established (1995) Court of Appeals, include: (1) whether these provisions are constitutional, (2) whether they apply to third party actions, (3) whether a complaint may serve as notice of claim, (4) will the doctrines of waiver and estoppel excuse a claimant who failed to file pre-suit notice of claim or failed to file suit within the time allowed by the limitations provision and (5) whether the doctrine of excusable neglect will excuse a plaintiff's untimely filing of suit against the state.

This article will examine these and other issues in light of available Mississippi state and federal court precedent, as well as similarly worded tort claims act statutes of other states and the judicial decisions interpreting those statutes.

II. NOTICE PROVISIONS

Subsection (1) of the Mississippi Tort Claims Act's notice provisions requires that at least 90 days prior to filing any

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host of changes into the Sovereign Immunity Act in 1993. *Id.* at 564-67.

[25] MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1995).

[26] *Id.* § 11-46-11(1), (2) (Supp. 1995). These provisions outline the time period and delivery requirements for notice of claims. *Id.*

[27] *Id.* § 11-46-11(3). The statute of limitations for filing claims is one year but is tolled for ninety-five days if the notice requirements are properly presented. *Id.*

[28] *Id.* § 11-46-3. There existed a provision which made the notice and statute of limitations provisions applicable to actions occurring on or after July 1, 1992 as to the state, and October 1, 1992 as to all political subdivisions, but this provision was repealed in 1992. *Id.* § 11-46-6, *repealed by* 1992 Miss. Laws, special session, ch. 3, § 2.

action against a governmental entity or employee, all claimants "shall" file a notice of claim with the chief executive officer of the entity being sued.[29] Subsection (2) provides that such notice "shall" be delivered in person, or by certified or registered mail, and "shall" contain certain information, to wit:

> (a) a short and plain statement of the facts upon which the claim is based, including the circumstances leading to the injury;
> (b) the extent of the injury;
> (c) the time and place the injury occurred;
> (d) the names of all persons involved;
> (e) the amount of money damages demanded; and
> (f) the residence of the claimant.[30]

Must plaintiffs filing negligence suits against Mississippi public entities strictly comply with these provisions?

A. *Strict Compliance in Mississippi*

Regarding compliance with tort claims act notice provisions, each state falls into one of three categories: (1) strict compliance, (2) substantial compliance or (3) a modified version requiring only substantial compliance with some notice provisions but strict compliance with others. Most states requiring strict compliance with tort claims act provisions ordinarily follow one of three rationales: (1) upholding a statutory mandate of strict compliance with legislative directives;[31] (2) holding that an express statutory requirement of filing written notice prior to instituting suit cannot be satisfied by any means other than those listed in the statute;[32] or (3) declaring that a provision in derogation of the common law concept of sovereign immunity must be strictly construed in favor of the sovereign, i.e., against waiver of immunity.[33]

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[29] MISS. CODE ANN. § 11-46-11(1) (Supp. 1995).

[30] *Id.* § 11-46-11(2).

[31] *See, e.g.*, Kleyer v. Harborview Med. Ctr., 887 P.2d 468, 470-71 (Wash. Ct. App. 1995) (stating "[f]ailure to file a claim in proper fashion results in dismissal of the suit").

[32] *See* Besette v. Enderlin Sch. Dist., 288 N.W.2d 67, 71 (N.D. 1980) (holding actual notice of incident insufficient to satisfy requirement of written notice).

The only issue in these jurisdictions is whether or not a claimant is in compliance with statutory notice provisions.[34] Compliance is deemed mandatory whenever a tort action is brought against the state or its employees, even when initiating an action under the auspices of another Act, such as a state medical malpractice act.[35]

In the absence of expressed legislative intent to require strict compliance, some courts have nevertheless strictly construed tort claims act notice provisions as a result of one or more factors: (a) the presence of the word "shall" in notice provisions, (b) the lack of qualifying language in the provisions, (c) the lack of clear, legislative expression that substantial compliance will suffice, or words to that effect, i.e., "in substance" or "substantially," and/or (d) the presence of a closed-ended tort claims act.

Usage of the word "shall" is the factor occurring most frequently in such decisions and is generally regarded as mandatory language.[36] In the tort claims act context, courts have considered the usage of "shall" as evidence of legislative intent to require strict compliance with notice of claim requirements of tort claims acts.[37]

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[33] *See* Campbell v. District of Columbia, 568 A.2d 1076, 1078 (D.C. Cir. 1990) (holding statutory requirements must be strictly observed).

[34] *See Besette*, 288 N.W.2d at 70. In *Besette*, the North Dakota court followed the majority view that failure to adhere to statutory notice requirements precludes an action against the government. *Id.*

[35] Saludes v. Ramos, 744 F.2d 992, 995-96 (3d Cir. 1984). When a tort claims provision conflicts with another statutory provision, such as a medical malpractice act, claimants must file notice correctly under both acts. *Saludes*, 744 F.2d at 995-96; *see also* Anne D. Bowling & James W. Reynolds, *Virginia's Medical Malpractice Act: Two Sets of Prerequisites for Filing a Tort Claim Against the Commonwealth's Health Care Providers*, 20 COLONIAL LAW. 63, 82 (1991) (describing correct procedural filings under Virginia's medical malpractice and tort claims acts).

[36] Lowrey v. Lowrey, 657 So. 2d 817, 819-20 (Miss. 1995). The Mississippi Supreme Court stated bluntly that "the word 'may' means discretionary, while the word 'shall' connotes a mandatory directive." *Lowrey*, 657 So. 2d at 819-20; *see* People v. Kelly, 485 N.E.2d 588, 589 (Ill. App. Ct. 1985) (holding "shall" generally means mandatory); American Employer's Ins. Co. v. City of Medford, 644 N.E.2d 241, 242 (Mass. App. Ct. 1995) (finding "shall" provision differed from "may" provision).

In light of this nationwide precedent, the Mississippi Legislature's choice of mandatory, condition precedent language, i.e., its repeated usage of the word "shall" in section 11-46-11, suggests an intent to require strict compliance with the notice of claim provisions and a directive to the courts to disallow mere substantial compliance. Although the Mississippi Supreme Court has yet to address this issue in the Tort Claims Act milieu, the court has ruled that a plaintiff's failure to comply with the mandatory ("shall") notice requirements in publishing notice of proposed incorporation[38] mandated the dismissal of a petition for municipal annexation.[39]

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[37] *See, e.g.*, Armstead v. Memorial Hosp., 892 P.2d 450, 452-53 (Colo. Ct. App. 1995) (holding where notice provisions stated that notice "shall be effective" only when served by certain method, such language requires strict compliance). A large number of courts have held substantial compliance with notice provisions insufficient. *Armstead*, 892 P.2d at 452-53; *see also* Bauman v. Colorado Dept. of Health, 857 P.2d 499, 501 (Colo. Ct. App. 1993) (holding compliance with mandatory notice provisions is jurisdictional prerequisite to bringing tort action against state agencies in light of legislative use of word "shall"); Hamide v. Department of Corrections, 584 So. 2d 136, 137 (Fla. Dist. Ct. App. 1991) (holding legislature's use of word "shall" in tort claims act notice provision meant substantial compliance would not suffice); Hardy v. Candler County, 448 S.E.2d 487, 490 (Ga. Ct. App. 1994) (holding notice provision's usage of word "shall" established mandatory jurisdictional prerequisite to suit); Finnerty v. New York State Thruway Auth., 550 N.E.2d 441, 442 (N.Y. App. Div. 1987) (holding legislature's use of word "shall" in tort claims act notice statute amounted to condition precedent to suits against state; where state waives immunity, it may establish such jurisdictional conditions precedent to suit as it wishes; and notice statute in derogation of common law must be strictly construed in favor of immunity); Sears v. Southworth, 563 P.2d 192, 194 (Utah 1977) (holding legislature's use of "shall" in tort claims act notice statute required full compliance); Lister v. Utah Valley Community College, 881 P.2d 933, 938 (Utah Ct. App. 1994), *cert. denied*, 892 P.2d 13 (Utah 1994) (holding Utah Tort Claims Act language providing that all claimants "shall" file pre-suit claim notice with Attorney General and concerned state agency required strict compliance); Kleyer v. Harborview Med. Ctr., 887 P.2d 468, 470-71 (Wash. Ct. App. 1995) (holding legislature's directive that claimants "shall file" ante-litem claim notice mandated strict compliance).

[38] MISS. CODE ANN. § 21-1-15 (1972).

[39] Wiley v. Corporate Boundaries of Iuka, 441 So. 2d 116, 117 (Miss. 1983). Because notice was not posted as required by statute, the *Wiley* court stated that the matter of annexation should not have even been heard. *Wiley*, 441 So. 2d at

Mississippi's federal district courts and at least one state circuit court have also touched upon the issue of strict compliance with the provisions of section 11-46-11. In *Jackson v. Jackson County*,[40] the Southern District Court dismissed a pendant state tort claim, stating that the state's argument for dismissal due to the plaintiff's lack of strict compliance with Tort Claim Act notice provisions was "persuasive on its face."[41] Similarly, in *Clifton v. Landry*,[42] where a plaintiff sent notice of claim to the wrong municipal official,[43] the Southern District Court adjudicated the notice to be ineffective and dismissed the plaintiff's claim.[44] In reaching its decision, the court cited tort claims act decisions from three other jurisdictions for the proposition that a legislature's use of the word "shall" requires strict compliance with tort claims act notice provisions.[45] Further, the circuit court in *Ross v. Splash Casino & Resort, Inc.*,[46] noting the mandatory "shall" language of

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[40] No. 1:95-CV-119GR (S.D. Miss. Oct. 10, 1995) (Gex, J., presiding).

[41] *Jackson*, No. 1:95-CV-119GR, slip op. at 22 & n.15. Although persuasive, the court saw no need to discuss the merits of the argument. *Id.* at 22 n.15; *accord* Simpson v. City of Pickens, 887 F. Supp. 126, 130 (S.D. Miss. 1995) (holding that notice requirements of section 11-46-11 are jurisdictional prerequisite warranting strict compliance).

[42] No. 2:95-CV-266PS (S.D. Miss. Jan. 31, 1996) (Pickering, J., presiding).

[43] *Clifton*, No. 2:95-CV-266PS, slip op. at 4-5. The plaintiff named the Hattiesburg Public School District as one of the defendants. *Id.* at 1. Notice was sent to the city attorney rather than the city's chief executive officer, the mayor, as required by section 11-46-11. *Id.* at 5.

[44] *Id.* The court observed that "[t]o hold otherwise would be to disregard specific statutory language." *Id.*

[45] *Id.* The district court noted that the issue had not been addressed by the Mississippi Supreme Court and thus found support for its holding in courts outside the state. *Id.*; *see* Stevens v. Wilson, 282 S.W.2d 628, 630 (Ky. Ct. App. 1955) (declaring that to allow anything other than strict compliance to suffice would invade province of legislature and defeat express wording of statute to make service of claim notice upon designated official mandatory and prerequisite to right to sue); Holahan v. City of Medford, 474 N.E.2d 1117, 1118 (Mass. 1985) (holding statute containing "shall" language clear on its face as to requirement of strict compliance); Meredith v. City of Melvindale, 160 N.W.2d 793, 795 (Mich. Ct. App. 1968) (finding language that claimant "shall file notice" established condition precedent to suit).

[46] No. 95-0169 (Tunica County Cir. Ct. Feb. 29, 1996) (Thomas, J., presiding).

section 11-46-11, ruled that the notice of claim and statute of limitations provisions of the Mississippi Tort Claims Act commanded "rigid" construction by the courts and must be strictly complied with by plaintiffs.[47]

Both the Southern District Court's interpretation of the Mississippi Tort Claims Act's notice provisions and the state circuit court's interpretation of the mandatory notice language of similar tort claim acts statutes suggest that Mississippi is a strict compliance state and that the Legislature mandated strict compliance with notice provisions of the Act. The lack of substantial compliance language in the notice provisions and the fact that the Legislature utilized no language to qualify the otherwise strict requirements bolster this conclusion. Indeed, had the Mississippi Legislature intended for substantial compliance to suffice, nothing prevented it from saying so, as did the legislatures in Alabama,[48] Illinois,[49] and Indiana.[50] Those states' courts have upheld substantial compliance with notice provisions because of their legislatures' use of the words "substantially"[51] or "in substance,"[52] or where language otherwise qualifying strict compliance was found in the notice provisions.[53] However, as there is no such substantial compliance or other qualifying language to be found in section 11-46-11 of the Mississippi Code, the rational assumption is that the Mississippi Legislature intended to require strict compliance with the notice provisions of the Act.

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[47] *Ross*, No. 95-0169, slip op. at 5. "[A]bsent a *statutory* exception," the court stated it "must apply the statute as it appears," and refused to "engraft a judicial exception." *Id.*

[48] ALA. CODE § 11-47-192 (1975). Alabama requires notice "stating *substantially* the manner in which the injury was received . . . ." *Id.* (emphasis added).

[49] ILL. COMP. STAT. ch. 85 § 8-102 (1981) (repealed 1986). The Illinois statute used the words "in substance." *Id.*

[50] IND. CODE § 34-4-16.5-6 (Supp. 1996). Indiana's statute provides that if a claim is filed with the wrong state agency, it is not barred if the claimant "reasonably attempts to determine and serve notice on the right state agency." *Id.*

[51] Peddycoart v. City of Birmingham, 392 So. 2d 536, 538 (Ala. 1980). Use of the word "substantially" could serve to modify the manner, day, time and place of the accident. *Peddycoart*, 392 So. 2d at 538.

[52] Rio v. Edward Hosp., 472 N.E.2d 421, 425 (Ill. 1984). Use of the words "in substance" establishes a substantial compliance standard. *Rio*, 472 N.E.2d at 425-26.

[53] Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468, 470-71 (Ind. 1988). The *Morris* court stated that the purpose of the notice requirement may be fulfilled without strict compliance. *Morris*, 528 N.E.2d at 470-71; *see* Mills v.

One basis for allowing a substantial compliance standard vis-a-vis the Mississippi Tort Claims Act notice provisions may be found in consideration of the open-ended versus close-ended issue. Some states' waiver of sovereign immunity is open-ended, meaning waiver is the rule and immunity is the exception which must be pled,[54] while some states' waiver is close-ended, meaning the legislature intended to maintain sovereign immunity with only a few exceptions to the rule.[55] In jurisdictions where this issue has been raised, the courts have been far more likely to allow substantial compliance where the tort claims act contained an open-ended waiver of immunity.[56]

Section 11-46-5(1) generally abrogates sovereign immunity[57] and requires a state entity to plead one of the exemptions established in section 11-46-9,[58] to the extent that they may

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American Playground Device Co., 405 N.E.2d 621, 622-24 (Ind. 1980) (finding legislative intent to make substantial compliance with notice provisions sufficient).

[54] *See* Dowers Farms Inc. v. Lake County, 607 P.2d 1361, 1366-67 (Or. 1980) (stating act is open-ended where defendant must plead exception to waiver of immunity). The court explained that, as a matter of public policy, an open-ended tort claims act should be liberally construed in favor of meritorious claimants. *Dowers Farm, Inc.*, 607 P.2d at 1367.

[55] *See* Prudential Property & Cas. Ins. Co. v. Monmouth County Mun. Joint Ins. Fund, 661 A.2d 785, 788 (N.J. 1995) (requiring strict compliance). Where the tort claims act statute in New Jersey provided that it was "the public policy of this State that public entities shall only be liable for their negligence within the limitations of [the Tort Claims Act]," immunity was the dominant consideration. *Prudential Property & Cas. Ins. Co.*, 661 A.2d at 788.

[56] Mary Frances Welch, *The Abrogation of Sovereign Immunity in Virginia: The Virginia Tort Claims Act*, 7 GEO. MASON L. REV. 291, 297 (1984). Where a state's tort claims act is open-ended, unlike the Federal Tort Claims Act, substantial compliance with its provisions should be allowed. *Id.*

[57] MISS. CODE ANN. § 11-46-5(1) (Supp. 1995). The statute provides, "[T]he immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived . . . ." *Id.*

[58] *Id.* § 11-46-9. Section 11-46-9 lists exemptions from liability for governmental entities on claims concerning particular circumstances. *Id.*

apply. This requirement suggests that Mississippi's Tort Claims Act is of the open-ended variety, thereby warranting substantial compliance with its notice provisions. However, section 11-46-3(1) states, "The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare . . . that the 'state' and its 'political subdivisions' . . . are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune . . . ."[59] Although the Legislature then waived immunity in section 11-46-5, such a forceful statement of public policy contained in section 11-46-3(1) suggests a strong intention toward limiting the state's liability. Further, as the Mississippi Supreme Court has previously stated, "[I]n construing statutes this Court will not only interpret the words used, but will consider the purpose and policy which the legislature had in view in enacting the law."[60] Consequently, it is impossible to state with any degree of certainty whether Mississippi's Tort Claims Act is open or closed-ended.

The issue may be moot, however, since the Legislature engrafted the mandatory language "shall" into the Act's notice provisions, without any qualifying substantial compliance language.[61] Consequently, for Tort Claims Act notice of claim purposes, it appears that Mississippi is a strict compliance state.

1. *Upon Whom Served*

In strict compliance states, notice of claim may be served only upon the official statutorily designated to receive it. The Massachusetts Tort Claims Act's notice requirements[62] are similar to that of Mississippi's, providing that notice "shall" be served upon the executive officer of the public entity being sued.[63] Massachusetts cases interpreting this statute have uniformly held presentment of ante-litem claim notice upon anyone other than the statutorily designated official is insufficient as a matter of law.[64] In *Weaver v Commonwealth*,[65] the Massachusetts Supreme Court noted that strict compliance was the only way to insure that proper notice was provided to an official with the authority to settle the claim, thereby satisfying the legislative purposes of investigation and settlement prior to incurring litigation costs.[66]

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[59] *Id.* § 11-46-3(1). This immunity expressly covers tortious acts of libel, slander and defamation. *Id.*

[60] Aikerson v. State, 274 So. 2d 124, 127 (Miss. 1973). The court asserted that such was necessary to "give effect to the intent of the legislature," which should be applied even if it meant going beyond the words of the statute. *Aikerson*, 274 So. 2d at 127.

[61] MISS. CODE ANN. § 11-46-11 (Supp. 1995).

[62] MASS. GEN. LAWS. ch. 258, § 4 (1988).

Other states have upheld the requirement of service only on the proper official, whether service was required to be had upon the Attorney General,[67] the state agency concerned,[68] the agency and the Attorney General,[69] a department of insurance or risk management,[70] a mayor,[71] city clerk,[72] county school board,[73] or other public official.[74]

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[63] *Id.* Mississippi requires that notice "shall" be served upon the "chief executive officer" of the public entity. MISS. CODE ANN. § 11-46-11(1) (Supp. 1995).

[64] *See, e.g,* Robinson v. Commonwealth, 584 N.E.2d 636, 638 (Mass. 1991) (discussing notice). It has been held that a lack of prejudice to the state is irrelevant when the proper state official is not served. *Robinson*, 584 N.E.2d at 638; *see also* Lodge v. District Attorney, 486 N.E.2d 764, 766 (Mass. App. Ct. 1985) (holding service of antelitem notice upon improper official cannot satisfy statutory purposes).

[65] 438 N.E.2d 831 (Mass. 1982).

[66] *Weaver*, 438 N.E.2d at 835. The court found that constructive notice did not assure an adequate opportunity to investigate claims. *Id.*; *accord* Kinan v. Trial Court, 511 N.E.2d 341, 344 (Mass. 1987) (holding presentation of claim must be to person with authority).

[67] Lewis v. Sullivan, 524 N.W.2d 630, 634 (Wis. 1994). The purpose of the notice statute is to allow the Attorney General time to investigate a claim against the state. *Lewis*, 524 N.W.2d at 634.

[68] Livingood v. Meece, 477 N.W.2d 183, 188 (N.D. 1991). In *Livingood*, because the state legislature required filing of a claim against the specific agency claimed against, the court would not allow suit without such a filing. *Livingood*, 477 N.W.2d at 188.

[69] Sears v. Southworth, 563 P.2d 192, 194 (Utah 1977). Even actual notice does not remove the necessity of service in compliance with statutory requirements in courts with this view. *Sears*, 563 P.2d at 194.

[70] Menendez v. North Broward Hosp. Dist., 537 So. 2d 89, 90-91 (Fla. 1988). In *Menendez*, the court found notice to the Insurance Department was an essential element of the plaintiffs claim. *Menendez*, 537 So. 2d at 90-91.

[71] Quinn v. Graham, 428 S.W.2d 178, 182-83 (Mo. Ct. App. 1968). Where a statute expressly requires that notice be given to the mayor, no other form will suffice. *Quinn*, 428 S.W.2d at 183; *cf.* Celanese Corp. v. Mayor of Wilmington, 78

Accordingly, since the Mississippi Legislature has drafted the Tort Claims Act notice requirements in mandatory, "shall" language, the filing of pre-suit claim notice with anyone other than the chief executive officer of the state agency or political subdivision sued will likely result in dismissal of the action, as has uniformly been held in other strict compliance jurisdictions.

2. *Content of Notice*

Most tort claims act notice provisions, including Mississippi's, require that claimants include specific information about the injury-causing occurrence in their claim notice. Courts in strict compliance states require absolute adherence to claim notice information requirements,[75] and many courts in substantial compliance jurisdictions, which generally allow some leniency with notice provisions, nevertheless mandate full compliance with all the information elements of claim notice. These elements include, among others, the date and place of occurrence and the amount of damages claimed. When these elements are not included in a plaintiff's claim notice, or when-

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A.2d 249, 252 (Del. 1950) (holding notice delivered to mayor's secretary sufficient when statute required notice to mayor).

[72] Andrews v. City of Lincoln, 401 N.W.2d 467, 468 (Neb. 1987). The plaintiff's failure to file with the city clerk barred the district court from hearing the claim in *Andrews*. *Andrews*, 401 N.W.2d at 468.

[73] Jackson v. Board of Educ., 58 Cal. Rptr. 763, 765 (Cal. 1967). The presentation of a claim to the city is not the same as presentation to the city's Board of Education. *Jackson*, 58 Cal. Rptr. at 765.

[74] Avila v. Wahlquist, 890 P.2d 331, 334 (Idaho 1995). Notice of a potential insurance claim does not constitute notice of a tort claim. *Avila*, 890 P.2d at 334.

[75] *See* Lewis v. City of Boston, 829 F. Supp. 471, 474 (D. Mass. 1993) (holding strict compliance required and all negligence theories must be included in notice); Vines v. Self Mem'l Hosp. 443 S.E.2d 909, 910 (S.C. 1994) (holding strict compliance with verification requirement of notice provisions is mandatory); Halbertstam v. Commonwealth, 467 S.E.2d 783, 785 (Va. 1996) (holding information requirements be strictly construed); Modica v. Verhulst, 536 N.W.2d 466, 470 (Wis. Ct. App. 1995) (holding strict compliance with requirement of including precise date of injury and names of all defendants in notice is mandated by statute). Constructive notice of a claim does not suffice when strict compliance is necessary. *Lewis*, 829 F. Supp. at 474.

ever courts find a plaintiff has not made a good faith effort to include each information element in the notice, courts often dismiss the complaint.

The California Tort Claims Act is similar to Mississippi's in terms of notice of claim content requirements. California's provisions require inclusion in the written notice of the information elements, some of which are:

(a) the name and post office address of the claimant,
(b) the defendant's name and address,
(c) the date and place of the occurrence,
(d) the circumstances of the occurrence giving rise to liability,
(e) a general description of the claimant's injuries, and
(f) the amount of money damages claimed.[76]

In *Phillips v. Desert Hospital District*,[77] a California Court of Appeals determined that, although California was a substantial compliance state, substantial compliance could not cure the total omission of any statutorily required element of the Tort Claims Act notice provisions.[78] Thus, where the claimant's notice letter lacked the plaintiff's address, a general description of the plaintiff's injury and the amount of money damages claimed, it failed to satisfy the notice requirements.[79] In barring the claim, the court concluded that insufficient notice prejudiced the state by not allowing it to fully investigate all factual aspects of the claim prior to incurring litigation costs.[80]

In *Wood v. Riverside General Hospital*,[81] where a claimant provided notice to a hospital administrator instead of to the county clerk, the California court posed two relevant questions: (1) was there some compliance with all of the statutory requirements and (2) if so, did that compliance constitute sufficient compliance?[82] Applying that test, the court concluded that the claimant's notice did not suffice since he failed entirely to comply with two elements by not serving the statutorily designated agent and by not asserting an itemized claim for monetary damages.[83]

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[76] CAL. GOV'T CODE § 910 (West 1995).

[77] 243 Cal. Rptr. 196 (Cal. Ct. App. 1988).

[78] *Phillips*, 243 Cal. Rptr. at 200-01. The court concluded that even knowledge on the defendant's part did not excuse compliance with filing requirements. *Id.*

[79] *Id.* at 201. California statute required this missing information. *Id.*

[80] *Id.* An important purpose of the information elements is to aid in the investigation of the claim. *Id.*

[81] 31 Cal. Rptr. 2d 8 (Cal. Ct. App. 1994).

Kansas' Tort Claims Act's notice content requirements are almost identical to Mississippi's in its use of the word "shall" to mandate pre-suit notice of the name and address of the claimant's attorney; a concise statement of the facts, including the circumstances of the occurrence and the time, date, and place of the injury; the name and address of the public employee involved; a statement of the nature of the claimant's injury; and the amount of damages requested.[84] In *Miller v. Brungardt*,[85] the federal district court, interpreting Kansas law on notice content, decided that, substantial compliance notwithstanding, where all information elements were not included in the notice, the claim was barred.[86] Substantial compliance existed, the court noted, only when a plaintiff made an attempt to satisfy each information element required by the statute, and could never exist with one element missing.[87]

Considering these decisions from quasi-substantial compliance state courts, even if Mississippi were held to be a quasi-substantial compliance state, a claimant's failure to provide each and every information element required by section 11-46-11(2) should nonetheless result in a dismissal of the action.

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[82] *Wood*, 31 Cal. Rptr. 2d at 10 (citing City of San Jose v. Superior Court, 525 P.2d 701, 709 (Cal. 1974)). The court asserted that without any attempted compliance, there was no compliance as a matter of law. *Id.*

[83] *Id.*

[84] KAN. STAT. ANN. § 12-105 (1991). Mississippi requires virtually the same information for notice. MISS. CODE ANN. § 11-46-11 (Supp. 1995).

[85] 904 F. Supp. 1215 (D. Kan. 1995).

[86] *Miller*, 904 F. Supp. at 1218. In *Miller*, one element was completely missing. *Id.*; *see* Wiggins & Tucking v. Board of Comm'rs, 796 P.2d 1055, 1059-60 (Kan. Ct. App. 1994) (finding lack of substantial compliance if one element of claim notice is missing).

[87] *Miller*, 904 F. Supp. at 1218. The plaintiff in *Miller* did not include the element of monetary damages in her notice of claim. *Id.*

3. *Method of Service*

May service of claim notice by ordinary mail suffice in Mississippi, where the Tort Claims Act requires personal, certified or registered mail delivery?[88] Where mandatory strict compliance language is utilized in claim notice statutory language, the courts ordinarily hold that service of the notice by means other than the statutorily sanctioned method is insufficient as a matter of law. In *Armstead v. Memorial Hospital*,[89] the Colorado Court of Appeals observed that the Tort Claims Act notice provisions[90] required service of claim notice by registered mail or personal service, and ruled that service sent by regular mail did not satisfy those requirements.[91] Acknowledging a statutory provision declaring that notice "shall be effective" only by certain means, the court concluded that such language was both mandatory and jurisdictional, dictating strict compliance by plaintiffs and strict construction by the courts.[92]

New York's highest court simply ruled that where the method-of-service statute[93] had been established pursuant to that state's waiver of sovereign immunity and in derogation of common law, strict compliance with its requirements was mandated.[94]

At least one Mississippi federal district court appears to be in accord with these decisions. In *Clifton v. Landry*,[95] Judge Pickering dismissed the plaintiff's complaint for insufficient notice, and implied that notice sent by regular mail was insufficient in light of "specific statutory language" requiring service by personal or certified delivery.[96]

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[88] MISS. CODE ANN. § 11-46-11(2) (Supp. 1995).

[89] 892 P.2d 450 (Colo. Ct. App. 1995).

[90] COLO. REV. STAT. ANN. § 24-10-109 (West 1996).

[91] *Armstead*, 892 P.2d at 452. The court noted that the reasoning behind the registered mail requirement was to insure the documentation of timely service. *Id.* at 453; *accord* Kelly v. Reyes, 484 N.W.2d 388, 389 (Wis. 1992) (holding service of notice by ordinary mail insufficient when statute requires certified mail or personal delivery).

[92] *Armstead*, 892 P.2d at 453. The court rejected the plaintiff's claim that substantial compliance was sufficient. *Id.*

[93] N.Y. CT. CL. ACT § 11 (McKinney Supp. 1995). The New York method of service statute required service of notice upon the court of claims clerk and delivery of a copy of the notice to the Attorney General. *Id.*

[94] Finnerty v. New York State Thruway Auth., 550 N.E.2d 441, 442-43 (N.Y. 1989). Service of a claim must be accomplished through the methods set out in section 11 of the Court of Claims Act. Hodge v. State, 622 N.Y.S.2d 1016, 1017 (N.Y. App. Div. 1995).

While *Clifton* is by no means binding precedent on this issue, that decision, along with numerous state court interpretations of mandatory tort claims act method of service provision language, should signal a warning to potential Mississippi claimants that service of claim notice should be obtained by personal, registered or certified mail delivery, as required by section 11-46-11(2) of the Mississippi Code.

4. *Complaint as Notice*

Unfamiliar with newly enacted tort claims acts and their notice provisions, plaintiffs' counsel occasionally file suit against public entities without first complying with tort claims act notice requirements. Upon discovering the requirements by way of a public entity's 12(b)6 Motion to Dismiss, counsel frequently allege that their complaint itself suffices as adequate notice of claim to the entity. As to the sufficiency of a complaint as notice of claim in a mandatory language, strict compliance state, nationwide precedent suggests that such purported notice is insufficient as a matter of law.

In *Eure v. United States Postal Service*,[97] the Mississippi Southern District Court held that the filing of complaints did not satisfy the notice requirements of the Federal Tort Claims Act.[98] The Federal Act's notice provisions contain mandatory language similar to Mississippi's notice provisions, stating that no action "shall" be instituted unless the claimant "shall" first make presentment of the claim to the designated agency.[99] The *Eure* case may be particularly significant for our purposes because, where state tort claims acts are based on the Federal Tort Claims Act or contain substantially similar language, state courts will often find the federal decisions interpreting the Act to be of precedential value.[100] Considering the similarity of the Mississippi Act's mandatory language to that of the Federal Tort Claims Act, the Mississippi Supreme Court would not likely allow complaints to suffice as notice.

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[95] No. 2:95-CV-266PS (S.D. Miss. Jan. 31, 1996) (Pickering, J., presiding).

[96] *Clifton,* No. 2:95-CV-266PS, slip op. at 5. Judge Pickering dismissed the complaint with prejudice. *Id.*

[97] 711 F. Supp. 1365 (S.D. Miss. 1989).

[98] *Eure*, 711 F. Supp. at 1369. The Federal Tort Claims Act specifically states that "the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a) (1994); *see also* Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 MINN. L. REV. 513, 516-34 (1982) (discussing notice requirements of Federal Tort Claims Act).

Three other recent Mississippi federal cases involved pendant state Tort Claims Act complaint-as-notice controversies. In *Jackson v. Jackson County*,[101] Judge Gex agreed with the state's argument that the plaintiff's complaint did not satisfy Mississippi's Tort Claims Act notice requirements.[102] Additionally, although he had already dismissed the pendant state claims for other reasons, he declared the state's strict compliance argument that the plaintiff's complaint did not suffice as proper notice was "persuasive on its face."[103]

In *Newell v. Newton County School District*,[104] where the county defendants argued for dismissal of pendant state negligence claims because the plaintiff gave no claim notice apart from filing suit, Judge Lee noted, "[P]laintiff has not contended that she provided [pre-suit] notice, nor has she alleged or intimated any reason for her failure to give such notice, nor suggested why such failure might be excused,"[105] and then dismissed her complaint pursuant to the requirements of section 11-46-11.[106]

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[99] 28 U.S.C. § 2675(a) (1994). According to decisions interpreting the Federal Tort Claims Act, the Act's notice provisions are to be strictly construed and accordingly, complaints may not suffice as notice of claim. Vernell v. United States Postal Serv., 819 F.2d 108, 110-11 (5th Cir. 1987); Crack v. United States, 694 F. Supp. 1244, 1246 (E.D. Va. 1988).

[100] See Hardy v. Candler County, 448 S.E.2d 487, 490 (Ga. Ct. App. 1994) (interpreting Georgia Tort Claims Act using Federal Tort Claims Act as guideline); Pickett v. Commonwealth, 604 N.E.2d 43, 44 (Mass. App. Ct. 1992) (examining meaning of "presentment" by looking at Federal Tort claims Act); Gardner v. State, 549 A.2d 1171, 1176 (Md. Ct. Spec. App. 1988) (stating Maryland's Tort Claims Act is modeled after Federal Tort Claims Act).

[101] No. 1:95-CV-119GR, (S.D. Miss. Oct. 10, 1995) (Gex, J., presiding).

[102] *Jackson*, No. 1:95-CV-119GR, slip op. at 22.

[103] *Id.* at 22 n.15.

[104] No. 3:94-CV-739(L)(N) (S.D. Miss. Sept. 29, 1995) (Lee, J., presiding).

However, in *Hellums v. Sheriff of Lee County*,[107] Northern District Court Judge L.T. Senter, Jr., issued a bald assertion that, under the facts of the case, the purpose of the Mississippi Tort Claims Act notice provision had been satisfied by the filing of the complaint.[108] The basis of the court's denial of defendant's motion to dismiss was its application of the equitable doctrines of waiver and estoppel, rather than a pure application of the substantial compliance standard. The court held that since the defendant waited to raise the issue of lack of notice until after the statute of limitations for refiling had run, then the state waived those objections.[109]

Reading these Mississippi federal court decisions together, it appears likely that Mississippi federal courts will continue to apply a strict compliance standard to the complaint-as-notice issue, except where waiver and estoppel may apply. If so, then these courts will align themselves with the majority of state courts in strict compliance jurisdictions.

In strict compliance states, the courts have uniformly held that a complaint will not suffice as notice of claim. In *Pickett v. Commonwealth*,[110] the Massachusetts Court of Appeals noted the legislature's use of the word "shall" in the Tort Claims Act notice statute,[111] as well as previous state supreme court precedent requiring strict compliance with those provisions,[112] and held that a complaint would not suffice as notice of claim to the state.[113] Observing that the purpose of the provisions was to give the state notice of a claim prior to the institution of suit, the court determined that a complaint could never accomplish that goal.[114]

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[105] *Jackson*, No. 3:94-CV-739(L)(N), slip op. at 5. The court noted a source which cited cases holding that "a notice provision cannot be waived or a governmental agency estopped to rely on it." *Id.* at 5 n.1.

[106] *Id.* at 22.

[107] No. 1:94-CV-03-S-D (N.D. Miss. May 18, 1995) (Senter, J., presiding).

[108] *Hellums*, No. 1:94-CV-03-S-D, slip op. at 10. Specifically, Judge Senter stated, "The purpose of the notice requirement has certainly been satisfied with the filing of the complaint." *Id.*

[109] *Id.* "[I]t would be a waste of time to dismiss the state law claim to allow the plaintiff to file notice and then attempt to proceed with the state law claim . . . ." *Id.* Waiver and estoppel as applicable to tort claims act notice provisions are considered *infra*.

[110] 604 N.E.2d 43 (Mass. App. Ct. 1992).

[111] MASS. GEN. LAWS ANN. ch. 258 § 4 (West Supp. 1995). In language strik-

In *Campbell v. District of Columbia,*[115] the court affirmed a judgment dismissing a wrongful death action against the District for failure to provide more comprehensive training to ambulance drivers holding that the filing of a complaint did not satisfy the notice of claim requirements of the Tort Claims Act[116] even though the complaint was filed within the time allotted for filing of claim notice.[117] Observing that the Act was "in derogation of the common law concept of sovereign immunity," the court ruled that "it must be strictly construed in favor of the sovereign, i.e., against waiver of immunity."[118] The *Campbell* court also declared that the purpose of the notice provisions was to ensure prompt notice of claims to District

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ingly similar to Mississippi's section 11-46-11, the Massachusetts Tort Claims Act provides that a "civil action shall not be instituted . . . unless the claimant shall have first presented his claim in writing to the executive officer of such public employer." *Id.*

[112] *Pickett*, 604 N.E.2d at 44. In the past, Massachusetts courts have narrowly interpreted the acceptable methods of presentment provided in the Massachusetts Tort Claims Act. Weaver v. Commonwealth, 438 N.E.2d 831, 835 (Mass. 1982); *see* Joseph W. Glannon & Bennett S. Gordon, *Practice and Procedure Under the Massachusetts Tort Claims Act*, 71 MASS. L. REV. 61, 65 (1986) (noting strict and "draconian" interpretation of presentment requirements).

[113] *Pickett*, 604 N.E.2d at 44. The *Pickett* court rejected the plaintiff's argument that the filing of a federal complaint satisfied the presentment requirement. *Id.*

[114] *Id.* The court reasoned that allowing the filing of a complaint to serve as notice would defeat the purpose of the Massachusetts Tort Claims Act. *Id.*

[115] 568 A.2d 1076 (D.C. 1990).

[116] D.C. CODE ANN. § 12-309 (1981). In order to maintain an action against the District of Columbia, the District's Tort Claims Act requires "notice in writing to the Mayor" or "[a] report in writing by the Metropolitan Police Department." *Id.*

[117] *Campbell*, 568 A.2d at 1078. The time limit for filing a claim is "six months after the injury" under the District's Tort Claims Act. D.C. CODE ANN. § 12-309 (1981).

[118] *Campbell*, 568 A.2d at 1078. The court stated that the language of the Tort Claims Act mandated strict interpretation of the notice requirement. *Id.*

officials, who could then institute timely investigation before evidence was lost and witnesses became unavailable, "settle meritorious claims," and "correct hazardous or potentially hazardous conditions."[119] Such a purpose could only be effectuated, the court concluded, by requiring service of notice of claim prior to commencement of the action. Otherwise, the District would incur legal costs defending itself which could have been avoided by early settlement of meritorious claims.[120]

Affirming a judgment dismissing a Governmental Immunity Act suit against a city and county for their failure to arrest a marijuana grower, the Wyoming Supreme Court, in *Dee v. Laramie County*,[121] held that the plaintiff's failure to allege that he had filed statutory notice of claim with either the city or the county prior to initiating his action deprived the court of subject matter jurisdiction.[122] The court ruled that, even though the statute was not explicit as to whether filing notice of claim was a jurisdictional prerequisite to filing suit where the statute read, "No action shall be brought . . . unless the claim . . . is presented to the entity,"[123] a condition precedent requirement could be reasonably assumed.[124]

In *Andrews v. State*,[125] the Washington Court of Appeals noted the mandatory language of the Tort Claims Act notice provisions[126] and held that it made pre-suit filing of claim notice a mandatory condition precedent to filing an action against the state.[127] The court noted that its interpretation and case law was "harsh and technical," but stated that the statutory language required such a ruling.[128] Similarly, while interpreting Virgin Islands Tort Claims Act law, the Third Circuit Court of Appeals held that all plaintiffs must strictly comply with the notice provisions of the Act[129] due to the "clear import" of the statutory language, and the statute's purpose of providing the government with an opportunity to investigate the case while the evidence was still fresh.[130]

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[119] *Id.* The *Campbell* court noted that litigation begins the moment a claim is filed. *Id.*

[120] *Id.* The court rejected the plaintiff's contention that a District Fire Department report was sufficient notice under the statute. *Id.*

[121] 666 P.2d 957 (Wyo. 1983).

[122] *Dee*, 666 P.2d at 959.

[123] WYO. STAT. ANN. § 1-39-113 (Michie Supp. 1996).

[124] *Dee*, 666 P.2d at 958. Wyoming's Governmental Claims Act provides the exclusive remedy for actions against the state. *Id.*

[125] 829 P.2d 250 (Wash. Ct. App. 1992).

[126] WASH. REV. CODE ANN. § 4.92.110 (West 1989). The Washington Tort Claims Act states that "[n]o action *shall* be commenced against the state . . . until a claim has first been presented." *Id.* (emphasis added).

[127] *Andrews*, 829 P.2d at 252. The Washington statute required a plaintiff to file notice with the risk management office. *Id.*

Unless the Mississippi Supreme Court adjudicates otherwise, or until the legislature rewrites the Tort Claims Act notice provisions to allow for substantial compliance therewith, all plaintiffs' counsel would be well advised to file a separate, written claim notice prior to instituting suit against Mississippi's public entities.

5. *Actual Notice*

The vast majority of states do not allow actual notice to substitute for written notice of claim to a public entity.[131] In strict compliance states, actual notice suffices only by virtue of statutory exception.[132] However, for actual notice to substitute for written notice, the actual notice must contain the same information as would have been provided pursuant to the Act's written notice provisions,[133] and it must be served upon the official statutorily designated to receive written notice.[134] These requirements insure that the proper official receives sufficient information about the injury in order to "investigate and evaluate" it prior to suit,[135] and they have been uniformly upheld in actual notice cases. The sole exception to their applicability is one court's decision that a public entity's failure to timely object to the deficiency of actual notice constituted a waiver of the defense of improper notice.[136]

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[128] *Id.* The court noted that precedent required strict interpretation of the statute. *Id.*

[129] V.I. CODE ANN. tit. 33, § 3410 (1994). The Act requires service of notice on the Governor and delivery of a copy to the Attorney General. *Id.*

[130] Saludes v. Ramos, 744 F.2d 992, 996 (3d Cir. 1984). The Virgin Island Tort Claims Act provides an exception to the requirement of prior notice in the event the government already knew of the facts surrounding the claim and was not prejudiced by delay. *Saludes*, 744 F.2d at 996.

[131] *See* Besette v. Enderlin Sch. Dist., 288 N.W.2d 67, 70 (N.D. 1980) (citing numerous state courts that hold with majority). The Wyoming Supreme Court has held that actual notice will not suffice as Tort Claims Act notice where the statute mandates written notice of claim. Duran v. Board of County Comm'rs, 787 P.2d 971, 974 (Wyo. 1990).

[132] *See, e.g.*, WIS. STAT. ANN. § 893.80(1)(a) (West Supp. 1995) (allowing actual notice to suffice so long as plaintiff also proves no prejudice to public entity); TEX. CIV. PRAC. & REM CODE ANN. § 101.101(a)(c) (West Supp. 1996) (approving sufficiency of actual notice of injury to proper official).

[133] Collier v. City of Texas City, 598 S.W.2d 356, 358 (Tex. Civ. App. 1980)

In light of the fact that no actual notice exception exists within the framework of the Mississippi Tort Claims Act, it is highly unlikely that the Mississippi Supreme Court would allow actual notice to suffice in actions against public entities.

6. *Waiver or Estoppel*

A rare basis of relief for not strictly complying with tort claims act notice provisions in strict compliance states arises when a plaintiff can establish the application of the equitable doctrines of waiver and estoppel. The Mississippi Supreme Court has specifically outlined the elements of proof of estoppel and waiver.

Estoppel in pais rests upon grounds of fraud, and includes the following elements: (a) one party's conduct or language amounting to representation or concealment of material facts, (b) representation or concealment with that party's knowledge of the true facts, (c) intent that the false representation be relied upon by another and (d) the other party's ignorance of the true facts and detrimental reliance or change of position.[137]

(holding actual notice exception requires plaintiff to provide same information as required in written notice provision).

[134] Reese v. Department of Highways & Pub. Transp., 831 S.W.2d 529, 530 (Tex. App. 1992). The Texas Court of Appeals has held that actual notice to employees of one governmental unit does not impute knowledge to another governmental unit. *Reese*, 831 S.W.2d at 530; *see* Smith v. State, 743 P.2d 124, 128 (N.M. Ct. App. 1987) (holding actual notice sufficient).

[135] *See* Vanstone v. Town of Delafield, 530 N.W.2d 16, 19 (Wis. Ct. App. 1995) (holding notice to city official must expressly give notice of claim).

[136] See Texas Dep't of Corrections v. Winters, 765 S.W.2d 531, 532 (Tex. App. 1989) (ruling defendant's failure to verify its answer which denied receipt of actual notice waived that defense).

[137] *See* Chapman v. Chapman, 473 So. 2d 467, 470 (Miss. 1985) (stating re-

Waiver, on the other hand, is a "voluntary, . . . knowing and intelligent relinquishment or abandonment of a known right or privilege."[138] The difference between waiver and estoppel is that in the former, the emphasis is upon the acts or intentions of the waiving party only, while estoppel occurs only when an act or intention on the part of one party induces the party alleging estoppel to take an act they would not otherwise have taken.[139] But are these doctrines applicable to the notice provisions of the Mississippi Tort Claims Act?

The only decision applying these two doctrines to the Act's notice provisions is that of the Northern District of Mississippi in *Hellums v. Sheriff of Lee County*.[140] In *Hellums*, where Judge Senter ruled that the county waived any objection to the plaintiff's lack of compliance with the requirements by failing to object before the statute of limitations for refiling the complaint had lapsed.[141] In reaching his decision, Judge Senter failed to make an analysis of the waiver and/or estoppel elements required by Mississippi law and may have allowed bad facts to create bad law.

Meanwhile, Mississippi's highest court has yet to declare whether or not estoppel or waiver are relevant to the Tort Claims Act notice requirements. While the doctrines are often held inapplicable in the tort claims act notice requirement context,[142] two exceptions to that general rule have evolved in

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quirements for estoppel); PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 206 (Miss. 1984) (applying doctrine of estoppel).

[138] Richardson v. Lucas, 741 F.2d 753, 756 (5th Cir. 1984); *see* Robinson v. State, 345 So. 2d 1044, 1045 (Miss. 1977) (holding defendant waived right to trial by jury).

[139] Pitts v. American Sec. Life Ins. Co., 931 F.2d 351, 357 (5th Cir. 1991). In *Pitts*, the court discussed the differences between the doctrines of waiver and estoppel, stating that "in contrast to waiver, . . . estoppel involves some element of reliance or prejudice . . . ." *Pitts*, 931 F.2d at 357.

[140] No. 1:94-CV-03-S-D (N.D. Miss. May 18, 1995) (Senter, J., presiding).

[141] *Hellums*, No. 1:94-CV-03-S-D, slip op. at 10. The county did object but not until after the statute of limitations had elapsed. *Id.*

[142] *See* Aetna Cas. & Sur. Co. v. Denver Sch. Dist., 787 P.2d 206, 207 (Colo. Ct. App. 1990) (discussing how majority of state courts hold waiver and estoppel cannot validate non-compliance with notice of claim provisions because those provisions constitute mandatory condition precedent to suit); Halberstam v. Common-

strict compliance jurisdictions. These exceptions are (1) misrepresentation as to the application of the notice requirements to a particular plaintiff's claim and (2) failure of counsel for the public entity to make timely objection to unsatisfactory notice.

In *City of Houston v. Torres*,[143] the Texas Supreme Court noted that a claimant may be excused from strict compliance with Tort Claims Act notice provisions if the public entity misleads the claimant by stating that the statutory notice requirements were inapplicable in his case.[144] However, it has also been held that neither silence nor settlement negotiations serve to estop the government from asserting the defective notice defense.[145]

Where a plaintiff made a good faith effort to serve the proper official and the defendant failed to timely deny that presentment was improperly made, the Massachusetts Supreme Court ruled that a more liberal interpretation of the presentment statute was warranted and refused to bar the plaintiff's action.[146] The court determined that the defendant's general allegation that the plaintiff's complaint failed to state a

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wealth, 467 S.E.2d 783, 785 (Va. 1996) (holding estoppel did not apply to Commonwealth). Some federal decisions have indicated that waiver and estoppel are inapplicable in the Federal Tort Claims Act context since the Act is to be strictly construed, proper notice is a jurisdictional prerequisite to suit, and neither the government nor its employees may waive jurisdictional requirements or estop the government from asserting jurisdictional defenses. *See* Burns v. United States, 764 F.2d 722, 724 (9th Cir. 1985) (discussing estoppel in context of Federal Tort Claims Act); Pugh v. Farmers Home Admin., 846 F. Supp. 60, 62 (M.D. Fla. 1994) (discussing waiver in relation to Federal Tort Claims Act).

[143] 621 S.W.2d 588 (Tex. 1981).

[144] *Torres*, 621 S.W.2d at 591. The court held that the city was estopped from asserting the defense of improper notice of claim. *Id.*; *see* Kitchen v. Incorporated Village of Freeport, 636 N.Y.S.2d 124, 126 (N.Y. App. Div. 1996) (holding local government estopped from asserting defense of untimely notice of claim).

[145] *See* Dockery v. Department of Housing Preservation & Dev., 637 N.Y.S.2d 183, 184 (N.Y. App. Div. 1996) (stating unawareness of notice of claim requirements do not warrant estoppel). The Utah Court of Appeals has held that the notice of claim requirement is to be strictly enforced, even in cases where the plaintiff has suggested settlement. Bellonio v. Salt Lake City Corp., 911 P.2d 1294, 1297 (Utah Ct. App. 1996).

[146] Vasys v. Metropolitan Dist. Comm'n, 438 N.E.2d 836, 840 (Mass. 1982). The *Vasys* court stated that fairness to the plaintiff called for a less stringent interpretation of the presentment requirement. *Vasys*, 438 N.E.2d at 841.

claim for which relief could be granted did not sufficiently notify the plaintiff that presentment was improper, particularly since the defendant delayed answering discovery requests pertaining to the correctness of presentment until the statute of limitations for refiling had run.[147] In *Baptiste v. Sheriff of Bristol County*,[148] the Massachusetts Appeals Court also declared that the only exception to strict compliance with Tort Claims Act notice provisions was when the authorities lulled a claimant into thinking that correct presentment would not be an issue.[149] However, in Massachusetts, estoppel and waiver only apply when the representation or waiver is made prior to the running of the applicable statute of limitations for filing notice. Once that time has run, no subsequent fraudulent act by a public entity can supply a basis for estoppel or waiver.[150]

The equitable doctrines of waiver and estoppel will likely have no application to Mississippi Tort Claims Act notice requirements because those provisions are mandatory conditions precedent to suits against public entities. Even so, since the Mississippi Supreme Court has allowed the application of waiver and estoppel in various instances pertaining to general law, counsel defending public entities should be prepared to make timely objection to improperly filed claim notices, or their clients may be held to have waived any such objections.

Finally, it has been uniformly held in both strict and substantial compliance states that a public entity's purchase of liability insurance does not waive a tort claims act's notice of claim requirements.[151] The fact that a number of Mississippi's political subdivisions have obtained this insurance should not serve to waive their defense of lack of notice.

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[147] *Vasys*, 438 N.E.2d at 840. The statute of limitations for refiling the complaint was two years. *Id.*

[148] 617 N.E.2d 641 (Mass. App. Ct. 1993).

[149] *Baptiste*, 617 N.E.2d at 645. The court ruled that the plaintiff's actions did not fall within the exception. *Id.* at 646.

[150] George v. Town of Saugus, 474 N.E.2d 169, 172 (Mass. 1985). The Massachusetts Supreme Court has ruled that in order for estoppel to apply, "it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done." *George*, 474 N.E.2d at 172 (quoting Corea v. Assessors of Bedford, 427 N.E.2d 925, 926 (Mass. 1981); *see* Joseph W. Glannon, *Massachusetts Tort Claims Act: Analysis and Update*, 75 MASS. L. REV. 52, 56 (1990) (discussing waiver and estoppel in strict compliance state).

[151] Gurley v. Memorial Hosp., 770 P.2d 573, 576 (Okla. 1989). The procedural

B. Substantial Compliance in Mississippi

The Mississippi Supreme Court has yet to rule on whether or not Mississippi is a strict compliance state, and because a few jurisdictions have applied substantial compliance law in the face of mandatory condition precedent legislative language,[152] a review of substantial compliance claim notice law is warranted.

Hoping to avoid the harsh results of strict compliance and seeking to avoid laying technical traps for unwary but meritorious claimants, some state legislatures have written substantial compliance into claim notice statutes while other state courts have engrafted substantial compliance into the common law for similar reasons. Whether substantial compliance is allowed by reason of legislative or judicial action, certain standards must be met in order for the doctrine to apply. Many courts require substantial compliance with each element of the statutory

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condition precedent notice requirement is not affected by insurance purchase. *Gurley*, 770 P.2d at 576. "The general rule applied to laws in derogation of sovereignty is that a statute will not be construed to divest the state of its immunities unless the [legislature's] intention is clearly expressed." *Id.*; *see* Turner v. Green, 704 F. Supp. 139, 141-42 (N.D. Ill. 1988) (applying rule in tort action against public officers); Levine v. Dade County Sch. Bd., 442 So. 2d 210, 212 (Fla. 1983) (holding plain language of statute waiving sovereign immunity "must be strictly construed); Jozwiak v. Leonard, 504 So. 2d 1260, 1261 (Fla. Dist. Ct. App. 1986) (finding county's purchase of liability insurance policy for sheriff did not constitute waiver), *aff'd* 513 So. 2d 666 (Fla. 1987); Brunton v. Porter Mem'l Hosp. Ambulance Serv., 647 N.E.2d 636, 640 (Ind. Ct. App. 1994) (applying rule in tort action against county-owned hospital); Rodgers v. Martinsville Sch. Corp., 521 N.E.2d 1322, 1325 (Ind. Ct. App. 1988) (applying rule in action against school district); Riddle v. Cain, 635 P.2d 394, 396 (Or. App. 1981) (stating county's ability to obtain insurance is irrelevant on issue of notice). *But see* Williams v. Adams, 459 A.2d 707, 709 (N.J. 1983) (holding claim notice provision bars suit against political subdivision with liability insurance but may not bar suit against its employee with personal liability coverage).

[152] *See, e.g.*, McGill v. Indiana Dept. of Corrections, 636 N.E.2d 199, 204 (Ind. Ct. App. 1994) (recognizing substantial compliance despite legislature's use of "shall" language); Willis v. City of Lincoln, 441 N.W.2d 846, 850 (Neb. 1989) (noting that Nebraska recognizes doctrine of substantial compliance).

claim notice.[153]

When some effort has been made to comply with all the requisite elements of notice but the designated entities or officials have not been served with notice of claim prior to the institution of litigation, the wrong method of service was utilized, or all the required contents of notice were not given with sufficient specificity, the courts in substantial compliance jurisdictions will then determine whether the compliance has been sufficient to serve the statutory purposes of the notice provisions. Where these purposes are not expressly stated in the statutes themselves, the courts will attempt to deduce legislative intent by reading between the lines of plain statutory language.

The courts frequently find the statutory purposes of claim notice statutes to be: (1) avoiding prejudice to the governmental entity,[154] and (2) allowing the governmental entity adequate time to properly investigate the claim, determine liability, correct any dangerous or defective conditions, make early settlement of meritorious claims, prepare a defense, locate witnesses and other evidence while still available, budget for potential fiscal liabilities, and avoid the expense of needless litigation.[155]

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[153] *Willis*, 441 N.W.2d at 850. The elements include upon whom the notice may be served, the correct method of service, and inclusion of all required information in the notice. *Id.*

[154] Johnson v. Maryland State Police, 628 A.2d 162, 165 (Md. 1993). The lack of prejudice to the state alone rarely excuses a claimant's failure to substantially comply with notice of claim requirements. *Johnson*, 628 A.2d at 165; *see* Galovick v. State Bd. of Comm'rs, 437 N.E.2d 505, 508 (Ind. App. 1982) (stating "[l]ack of notice . . . is a complete defense to a tort action"); Rink v. Richland Mem'l Hosp., 422 S.E.2d 747, 748-49 (S.C. 1992) (holding failure to comply with notice statute prevents action in absence of prejudice). *But see* Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 677 (4th Cir. 1995) (acknowledging that Maryland's notice statute cited lack of prejudice as proper excuse for plaintiff's failure to provide written claim notice).

[155] *See* Life v. County of Los Angeles, 278 Cal. Rptr. 196, 199 (Cal. Ct. App. 1991) (noting proper notice may save public entity litigation cost); Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468, 471 (Ind. 1988) (declaring purpose of notice statute was to allow city officials opportunity to investigate); *Willis*, 441 N.W.2d at 850 (noting purpose of notice requirement is to provide party chance to investigate or settle claim); Martinez v. City of Clovis, 625 P.2d 583, 585 (N.M. Ct. App. 1980) (stating purpose of notice statute is to "protect against similated

Whether these purposes have been satisfied by a claimant's notice and whether substantial compliance has been effectuated have usually been held to be questions for the courts to decide.[156] Of course, in Mississippi, such matters would always be a question for the court, since all cases brought under the purview of the Tort Claims Act are to be heard as bench trials in Circuit Court.[157]

1. *Upon Whom Served*

The courts in a majority of substantial compliance states have held a plaintiff's failure to serve notice upon the proper official bars the plaintiff's action. These courts reasoned that service upon the wrong official greatly increases the chances that the statutory purposes will not be served, and the public entity will lose its opportunity to make prompt investigation and settlement prior to incurring litigations costs.[158]

In *Riddle v. Cain*,[159] the Oregon Court of Appeals held that service of Tort Claims Act notice on a county's insurance adjuster did not suffice as notice to the county clerk where the adjuster never delivered the notice to the clerk.[160] The court,

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or aggravated claims"); Brittain v. State, 882 P.2d 666, 672 (Utah Ct. App. 1994) (recognizing notice requirements prevent litigation); *see also* Jamie McAlister, *The New Mexico Tort Claims Act: The King Can Do "Little" Wrong*, 21 N.M. L. REV. 441, 448 (1991) (discussing reasons for enactment of notice requirements).

[156] Ammerman v. State, 627 N.E.2d 836, 838-39 (Ind. Ct. App. 1994). Indiana courts have held that the question of substantial compliance is for the courts to decide even though the determination involves factual issues. *Ammerman*, 627 N.E.2d at 838-39; *see McGill*, 636 N.E.2d at 204 (applying substantial compliance in personal injury action against state of Indiana); Travis v. Kansas City, 491 S.W.2d 521, 522 (Mo. 1973) (stating rule in action against municipality).

[157] MISS. CODE ANN. § 11-46-13(1) (Supp. 1995). The Mississippi Code provides that "[t]he judge of the appropriate court shall hear and determine, without a jury, any suit filed under the [Tort Claims Act]." *Id.*

[158] *Willis*, 441 N.W. 2d at 850. The Nebraska Supreme Court stated that notice to the wrong official denied the appropriate political subdivision the chance to investigate and possibly settle the claim. *Id.*

[159] 635 P.2d 394 (Or. Ct. App. 1981).

[160] *Riddle*, 635 P.2d at 395. The Indiana Court of Appeals similarly held a plaintiff's notice of claim insufficient because the plaintiff directed notice to the hospital's insurance carrier instead of the hospital, and the notice did not adequately describe the facts surrounding the claim. Hasty v. Floyd Mem'l Hosp., 612

in barring the claim, explained that although substantial compliance sufficed on some occasions, it did not apply when the official designated by the legislature to be served never received the notice.[161]

Interpreting the notice provisions of the Illinois Tort Immunity Act,[162] the federal district court in *MUI v. Dietz*,[163] held that a plaintiff's filing of claim notice with the police department did not amount to substantial compliance with the statute, which required service of notice on the city clerk.[164] The court noted that the purpose of the notice provision was to allow the city an opportunity to promptly investigate and settle meritorious claims and that because the plaintiff's claim notice failed to serve the statutory purpose, the pendent state law claims were barred.[165]

In *Johnson v. San Diego Unified School District*,[166] a California appellate court, after first observing that California was a substantial compliance state, held that where the investigatory purposes of the claim notice statute were not satisfied by proper notice, the doctrine of substantial compliance had no application,[167] and that service upon one other than the statutorily designated official could never amount to substantial compliance.[168]

N.E.2d 119, 123 (Ind. Ct. App. 1992).

[161] *Riddle*, 635 P.2d at 395. The plaintiff in *Riddle* claimed that the notice given to the defendant's insurance adjuster was sufficient because the insurance company processed all claims against the defendant hospital. *Id.*

[162] ILL. COMP. STAT. ch. 85, § 8-102 (Supp. 1983). The Illinois Tort Claims Act has since been amended by the Illinois Local Governmental and Governmental Employees Tort Immunity Act. 745 ILL COMP. STAT. ANN. 10/1-101 to 1-210 (West 1993).

[163] 559 F. Supp. 485 (N.D. Ill. 1983).

[164] *Mui*, 559 F. Supp. at 490. Mui filed suit against Chicago police officers claiming violations of his civil rights. *Id.* at 487.

[165] *Id.* at 490. The *Mui* court based its holding on other Illinois decisions strictly interpreting the notice requirement. *Id.*

[166] 266 Cal. Rptr. 187 (Cal. Ct. App. 1990).

[167] *Johnson*, 266 Cal. Rptr. at 190. California courts have allowed substantial compliance in appropriate cases where the public entity was not prejudiced. *Id.*

[168] *Id.* In *Johnson*, the plaintiff erroneously notified the California State Board of Control of her personal injury claims, instead of the school district allegedly causing her injury. *Id.*

In *Life v. County of Los Angeles*,[169] the California Court of Appeals noted that section 915 of the California Government Code established a duty for the claimant to file notice exclusively with the State Board of Control, and found a plaintiff's filing of notice with a subordinate state agency official to be insufficient.[170] Even though the official served later delivered the notice to the proper agency, the court decided that such notification was not in keeping with legislative intent to provide notice to those officials specifically designated to receive it, thereby insuring prompt investigation and pre-suit settlement of meritorious claims.[171] To rule otherwise, the court noted, would be to defy legislative intent by shifting the duty of effectuating service of claim notice on the proper party away from the plaintiff, the only person charged with that responsibility.[172]

The Supreme Court of Nebraska also declared in *Willis v. City of Lincoln*[173] that, while substantial compliance could save a claim where the contents of the notice requirements were not fully satisfied, the doctrine could not preserve an action where the plaintiff failed to serve the statutorily designated official.[174] This was so, the court reasoned, because service upon anyone other than the correct official frustrated the purposes of early investigation and pre-suit settlement of meritorious claims.[175]

Nevertheless, some courts in substantial compliance states have not followed California's and Nebraska's lead and have allowed the doctrine to save a claim where the plaintiff failed to serve notice on the designated official, but notice was ultimately delivered by the person served to the correct official. For example, in *Woodrow v. University of Oklahoma Board of Regents*,[176] the Oklahoma Court of Appeals excused a plaintiff's failure to serve notice on the Attorney General because the agency served by the plaintiff made timely delivery of the notice to the Attorney General. The statute's purposes had been satisfied, the court noted, since the Attorney General received the notice in ample time to investigate and settle the claim prior to the institution of suit.[177]

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[169] 278 Cal. Rptr. 196 (Cal. Ct. App. 1991).

[170] *Life*, 278 Cal. Rptr. at 200. The plaintiff initially only notified the county hospital of her medical malpractice claim. *Id.* at 198.

[171] *Id.* at 200. The plaintiff also instituted a legal malpractice suit against his attorney for failure to timely file a governmental tort claim. *Id.* at 198.

[172] *Id.* at 201. The *Life* court acknowledged that the California notice of claim statute required that a misdirected claim be "actually received" by the appropriate entity to be sufficient. *Id.* at 200.

[173] 441 N.W.2d 846 (Neb. 1989).

[174] *Willis*, 441 N.W.2d at 849-50. The court stated that "[a] notice of claim filed only with one unauthorized to receive a claim pursuant to [statutory requirements] does not substantially comply with the notice requirements." *Id.* at 850.

[175] *Id.* at 849-50. The city made no allegations that the content of the letter constituted "inadequate notice," so the court did not reach this issue. *Id.*

In *Indiana State Highway Commission v. Morris,*[178] the Indiana Supreme Court held that a plaintiff's service of claim notice upon the state agency, combined with the state agency's delivery of a copy of the plaintiff's notice to the statutorily designated official, the Attorney General, amounted to substantial compliance with the notice provisions of the Indiana Tort Claims Act.[179] The court reasoned that since the statute required filing with both the agency and the Attorney General, but was silent as to who should accomplish the filing, the statutory purpose of advising the state of a pending claim had been accomplished. So long as the agency received the notice and filed it with the Attorney General, substantial compliance had been effectuated.[180]

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[176] 861 P.2d 1009 (Okla. Ct. App. 1993).

[177] *Woodrow*, 861 P.2d at 1011. The Attorney General received actual notice in a timely fashion, so no prejudice to the state occurred. *Id.*

[178] 528 N.E.2d 468 (Ind. 1988).

[179] *Morris*, 528 N.E.2d at 470. In relevant part, the statute provided that notice of a claim had to be:

> filed with the attorney-general *and* the state agency involved within *one hundred eighty [180] days* after the loss occurs. However, if notice to the state agency involved is filed with the wrong state agency, that error does not bar a claim if the claimant reasonably attempts to determine and serve notice on the right state agency.

IND. CODE ANN. § 34-4-16.5-6 (Michie 1982) (emphasis added). This provision was amended in 1995 to provide that notice could be "filed with the attorney general *or* the state agency involved within *two hundred seventy (270) days* after the loss occurs." IND. CODE ANN. § 34-4-16.5-6 (Michie Supp. 1996) (emphasis added).

[180] *Morris*, 528 N.E.2d at 470-71. "[W]e see no need to endorse a policy which

In regards to a Mississippi analysis of the sufficiency of delivery of notice by one state official to another, *Life* and *Johnson* may have more application than *Woodrow* and *Morris. Life* concerned a statutory requirement of service on only one designated official, who was never properly served, while the *Woodrow* and *Morris* courts excused noncompliance with statutes requiring service upon two designated officials, where one was properly served. As previously noted, Mississippi's Act requires service upon only one official, a requirement more akin to that of California's.

Other courts also allow substantial compliance to suffice when counsel for a public entity fails to timely object to improper notice. For example, in *Spence v. State*,[181] a plaintiff filed a notice of claim with the injury-causing state agency, the highway patrol, but not with the State Board of Control, as required by California statute.[182] The California appellate court upheld the notice, reasoning that the defendant's want of diligence in raising the issue of lack of proper notice in its answer or pretrial motions and its failure to include its objection in the pre-trial order, waived the defense of non-compliance.[183] However, had the defendant timely objected to the improper notice, the court would very likely have dismissed the action, as it later did in the *Life* case.

Read together, these other state court decisions lead us to the inescapable conclusion that even if the Mississippi Supreme Court does allow substantial compliance to be a factor in determining the sufficiency of notice served upon the wrong official, unless that notice is ultimately delivered to the designated official in a timely manner, or unless defense counsel is not

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renders the statute a trap for the unwary *where such purpose has in fact been satisfied.*" *Id.* at 471 (quoting Galbreath v. City of Indianapolis, 255 N.E.2d 225, 229 (Ind. 1970)).

[181] 18 Cal. Rptr. 302 (Cal. Dist. Ct. App. 1961).

[182] *Spence*, 18 Cal. Rptr. at 303 & n.2 (citing CAL. GOV'T CODE § 643 (Supp. 1959)). Section 643 was repealed in 1963; the replacement provision provided a six month limit for providing notice. CAL. GOV'T CODE § 945.6(a) (1963).

[183] *Spence*, 18 Cal. Rptr. at 304-06. The court stated that this failure was "fatal" to the defense of non-compliance. *Id.* at 306.

diligent in raising the issue of lack of proper notice, substantial compliance will not prevent dismissal where the official designated to be served under section 11-46-1(1) of the Mississippi Code is not so served.[184]

2. *Content of Notice*

Although the exact form of claim notice has been held to be irrelevant for purposes of substantial compliance,[185] many courts in substantial compliance jurisdictions require substantial compliance with each and every element of the contents of claim notice.[186] However, some courts do not make this requirement, especially where the purposes of the notice requirements are served by the notice given.

In *Peddycoart v. City of Birmingham*,[187] an action to recover damages for outrageous police conduct resulting in emotional distress, the Alabama Supreme Court held that the claimant substantially complied with the statutory notice requirements even though he omitted the alleged occurrence date.[188] The court noted that Alabama had for some time allowed substantial compliance with notice provisions, and found that the plaintiff's notice satisfied statutory notice purposes by affording city officials ample time to investigate the occurrence prior to the institution of suit.[189]

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[184] MISS. CODE ANN. § 11-46-11 (Supp. 1995). "[S]uch person shall file a notice of claim with the chief executive officer of the governmental entity . . . . " *Id.* § 11-46-11(1).

[185] L.S.T. Inc. v. Crow, 834 F. Supp. 1355, 1359 (M.D. Fla. 1993), *rev'd on other grounds*, 49 F.3d 679 (11th Cir. 1995). The court, applying Florida law, held that no exact form of notice was prescribed by the statute. *L.S.T. Inc.*, 834 F. Supp. at 1359. In states where a particular form of notice is statutorily mandated, a different result would most likely be obtained.

[186] *See, e.g.*, Dilts v. Cantua Elementary Sch. Dist., 234 Cal. Rptr. 612, 618 (Cal. Dist. Ct. App. 1987). "The doctrine of substantial compliance cannot cure the total omission of an essential element from the claim or remedy a plaintiff's failure to comply meaningfully with the statute." *Dilts*, 234 Cal. Rptr. at 618.

[187] 392 So. 2d 536 (Ala. 1980).

[188] *Peddycoart*, 392 So. 2d at 538-39. The claim notice stated that the incident occurred "on or about" the date in question. *Id.* at 538.

[189] *Id.* The court held that because the evidence concerning the exact date of the incident was inconclusive, this question of fact should have been left for the

In *Chicago Lumber Co. v. School District No. 71*,[190] the Nebraska Supreme Court ruled that inclusion of "the exact date and the precisely specified location" was not mandated by Tort Claims Act language requiring notice of "time and place of the occurrence".[191] Substantial compliance, the court stated, required only such notification to the political subdivision as would provide it an opportunity to investigate the claim and determine whether to settle or defend against it.[192] The statute should be liberally construed so as not to deny relief simply on the basis of technical non-compliance, especially where no prejudice to the public entity had been shown.[193]

In *Keating v. Wiese*,[194] the Nebraska Court of Appeals noted that substantial compliance would not save a notice sent to the wrong entity, but concluded that a claim notice deficient only in content substantially complied with the statute[195] when it afforded the governmental subdivision a pre-action opportunity to examine the claim's merits and avoid the expenses, time and rigors of litigation.[196] Although the claim letter in question did not specify the location of the accident, the letter and an attached copy of the accident report sufficiently informed the defendant city of the time and place of the accident. The court noted that the city was aware of its potential liability and was given ample opportunity to investigate the

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jury. *Id.* at 539. The trial court had granted a directed verdict for the defendant. *Id.* at 537.

[190] 417 N.W.2d 757 (Neb. 1988).

[191] *Chicago Lumber Co.*, 417 N.W.2d at 764-65. The court stated that "the fullness or precision required in a pleading" was not mandated by the Nebraska statute. *Id.* at 765.

[192] *Id.* at 766. The court did not address the issue of whether receipt of actual notice of a claim would substantially comply with the Nebraska statute. *Id.*

[193] *Id.* The court noted that the plaintiff's attorney sent a letter to the appropriate governmental official as notice of the claim, which clearly identified the incident at issue. *Id.*

[194] 510 N.W.2d 433 (Neb. Ct. App. 1993).

[195] NEB. REV. STAT. § 13-905 (Supp. 1991). "All such claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant." *Id.*

[196] *Keating*, 510 N.W.2d at 438-39. The municipality's response to the claimant's letter indicated that proper notice was given. *Id.* at 439.

claim, but asked for no more details and was not in any way prejudiced by the notice it received.[197]

Rejecting a city's contention that the lack of block and lot numbers in a plaintiff's claim notice barred his slip and fall action, a New York appellate court in *Herrera v. City of New York*,[198] held that an inaccurate description of an accident site complied with claim notice requirements.[199] The notice contained a description sufficient to permit the city to locate the particular parking lot and was accompanied by numerous photographs showing the position of the manhole in the lot.[200] Noting that the intended function of the claim notice was "not to assist the City in performing a title search, nor to supply it with a device to avoid paying apparently meritorious claims,"[201] the court found that the city had suffered no prejudice because it had been given sufficient information to allow it to investigate the claim.[202]

In *State Department of Natural Resources v. Waukesha*,[203] the Wisconsin Supreme Court found substantial compliance with the Tort Claims Act's notice of claim requirements[204] even though the plaintiff did not identify the claimant's address nor include "an itemized statement of the relief" requested in the notice.[205] Observing that the notice contained the claimant's attorney's address and listed as detailed a description of damages as possible under the circumstances, the court held that the plaintiff had fulfilled the purposes of the notice requirements by supplying the city with sufficient information to allow it to determine whether to settle the claim or budget for litigation.[206]

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[197] *Id.* "[T]he city's interpretation of the letter indicate[d] that the city considered it a claim, and [the court found] find that the letter was a claim." *Id.*

[198] 622 N.Y.S.2d 524 (N.Y. App. Div. 1995).

[199] *Herrera*, 622 N.Y.S.2d at 525. The statute provides that "[t]he claim shall state the time when and place where such claim arose, the nature of same, and the items of damage or injuries . . . ." N.Y. CT. CL. ACT § 11(b) (McKinney 1990).

[200] *Herrera*, 622 N.Y.S.2d at 525. The claim stated that the accident occurred due to a "broken, uncovered, uneven, raised . . . manhole cover." *Id.*

[201] *Id.* The city argued that "without block and lot numbers it could not" properly identify the location of the accident. *Id.*

[202] *Id.* The court noted that the city did not make any attempt to send "an investigator to the scene." *Id.*

[203] 515 N.W.2d 888 (Wis. 1994).

[204] *Waukesha*, 515 N.W.2d at 896. Wisconsin is a substantial compliance state with regard to contents of notice, but not regarding the time in which to file notice. *See* Michael J. Waldspurger, *supra* note 15, at 627.

[205] *Waukesha*, 515 N.W.2d at 896. The Wisconsin court stated that a "specific dollar amount" must be included in the notice and the notice in question satisfied

These decisions support the conclusion that in substantial compliance states, inconsequential errors, such as stating that an injury occurred on the street when it in fact occurred on the sidewalk, are usually not a sufficient basis for dismissal of an otherwise meritorious action.[207]

Courts in substantial compliance states will rarely, however, excuse non-compliance with notice content statutes when claims do not contain a demand for payment in money damages, lack one of the necessary elements of notice, or where all theories of recovery to be used at trial are not included in the notice.[208] The rationale for barring claims lacking money demands is that when public entities receive notices of injury *sans* money demands, they cannot always anticipate that litiga-

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this requirement. *Id.*

[206] *Id.* The court held that where a claim adequately stated a request for "equitable relief" even though an injunction was not specified, the claim substantially complied with the notice requirement. *Id.*

[207] *See, e.g.,* Brooks v. City of Chicago, 435 N.E.2d 1182, 1187-88 (Ill. App. Ct. 1982) (noting municipality received actual notice). *But see* Ramos v. Armstrong, 289 N.E.2d 709, 711 (Ill. App. Ct. 1972) (noting apparently "harsh" result). In *Ramos*, the court noted that the plaintiff failed to include his own address, although the address of his attorney was provided. *Ramos*, 289 N.E.2d at 710-11. The court stated that the trial court properly dismissed the complaint for failing to adhere to the statutory requirements. *Id.* at 712. The court held that stare decisis required the strict construction of the notice requirements. *Id.* at 711.

[208] *See* Robinson v. Brice, 894 S.W.2d 525, 528 (Tex. Ct. App. 1995) (holding adequate notice required "demand for compensation"); *see also* Loehr v. Ventura County Community College Dist., 195 Cal. Rptr. 576, 583 (Cal. Dist. Ct. App. 1983) (stating that "[t]he doctrine of substantial compliance, however, cannot cure total omission of an essential element from the claim"). The California Court of Appeals has held that a lawyer's letter of representation is not sufficient notice of a claim. Green v. State Ctr. Community College Dist., 41 Cal. Rptr. 2d 140, 146 (Cal. Ct. App. 1995). An Indiana court has also held that a letter of representation, without more, is insufficient to satisfy notice requirements. Coghill v. Badger, 418 N.E.2d 1201, 1206 (Ind. Ct. App. 1981).

tion is pending and have no reason to launch an investigation to determine their potential liability.[209] Further, where negligence theories or causes of action are raised for the first time in a complaint, public entities have lost their opportunity to make pre-suit investigation or settlement of those claims.[210]

Finally, non-compliance with information requirements has been excused in substantial compliance states where the public employee's actions make equitable considerations applicable.[211] For example, where a public entity misleads the claimant as to its responsibility for the claimant's injury or damages, courts in substantial compliance jurisdictions will rule that the claimant's good faith efforts to serve the proper official in the face of the misleading statements amount to substantial compliance.[212]

The Mississippi Supreme Court may excuse inconsequential non-compliance with the information requirements of section 11-46-11 when that statute's investigatory purposes have been satisfied, but there is no basis in Mississippi law or the law in states with similarly worded notice statutes for the proposition that the Court will excuse total non-compliance with information requirements or a plaintiff's failure to include each of the statutorily required elements of notice in his claim.

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[209] Robinson v. Shipley, 669 P.2d 1169, 1171 (Or. Ct. App. 1983). The *Robinson* court held that substantial compliance could only be used to offset "harsh results" if the underlying purpose of statutory requirements had been met. *Robinson*, 669 P.2d at 1171.

[210] *See* Turner v. State, 284 Cal. Rptr. 349, 353 (Cal. Ct. App. 1991) (holding complaint could only clarify grounds given in claim notice); *see also* Tambolleo v. Town of West Boylston, 613 N.E.2d 127, 131 (Mass. App. Ct. 1993) (holding intentional tort claim notice as insufficient basis for negligence claim). The *Tambolleo* court affirmed summary judgment for the defendant. *Tambolleo*, 613 N.E.2d at 128.

[211] *See, e.g.,* Feinberg v. New Jersey Dep't of Envtl. Protection, 644 A.2d 593, 597 (N.J. 1994) (noting defendant's "dilatory tactics"). The court noted that the plaintiff required further discovery to identify the appropriate entity. *Feinberg*, 644 A.2d at 597.

[212] *Feinberg*, 644 A.2d at 597; Dambro v. Union County Park Comm'n, 327 A.2d 466, 471 (N.J. Super. Ct. Law Div. 1974). *But see* Sinclair v. Dunagan, 905 F. Supp. 208, 212 (D.N.J. 1995) (holding lack of prejudice to government will not excuse plaintiff's lack of diligence in attempting to comply with notice statute).

3. *Method of Service*

State tort claims act provisions regarding method of service of claim notice on public entities range anywhere from ordinary or certified mail to personal delivery. Section 11-46-11(2) of the Mississippi Code (Supp. 1995) requires service of claim notice upon a designated official only by personal delivery or by certified or registered mail.[213] If the Mississippi Supreme Court should determine that substantial compliance is a relevant consideration to method of service, would service of claim notice by ordinary mail suffice?

Several courts in substantial compliance jurisdictions have answered this question in the affirmative, deciding that timely notice delivered by any method to the designated official suffices so long as the statutory purposes of prompt investigation and settlement are satisfied.[214] For example, in *Brown v. Portland School District No. 1*,[215] the Oregon Supreme Court ruled that a claimant's notice, sent by regular mail rather than the statutorily required certified mail, substantially complied with Tort Claims Act[216] notice requirements.[217] Expressing disdain for draconian enforcement of technical requirements, the court ruled that notice, proper in form and content and timely received by the appropriate official, fulfilled notice requirements since it satisfied the purposes of pre-suit investigation and did not frustrate the object of the statute, namely, to exclude claims where notice did not reach the appropriate official.[218]

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[213] MISS. CODE ANN. § 11-46-11(2) (Supp. 1995). Written notice is required. *Id.*

[214] *See* Reynolds v. City of Tuscola, 270 N.E.2d 415, 417 (Ill. 1971) (holding personal service unnecessary when public entity received actual notice in timely fashion); Webb v. Highway Div., 652 P.2d 783, 785-86 (Or. 1982) (holding that when notice is received by official with authority to settle, incorrect method of service is not bar to claim); *see also* Board of Aviation Comm'rs v. Heston, 473 N.E.2d 151, 154-55 (Ind. Ct. App. 1985) (holding actual knowledge of claim allows application of substantial compliance doctrine). When the statutory purpose of the notice requirement is fulfilled by timely delivery of notice to the appropriate official, substantial compliance with the statute is acceptable. *Board of Aviation Comm'rs*, 473 N.E.2d at 155.

[215] 628 P.2d 1183 (Or. 1981).

[216] OR. REV. STAT. § 30.275 (Supp. 1996). The statute provides for notice "by mail or personal delivery." *Id.* § 30.275(5).

[217] *Brown*, 628 P.2d at 1186. The *Brown* court stated "where the notice required . . . is actually received by the statutorily designated official, the statute has been substantially complied with." *Id.*

The Colorado Court of Appeals has interpreted the method of delivery statute[219] as merely establishing a means of effectively proving timeliness of delivery and nothing more,[220] stating that the "legislature did not intend that the written notice actually received by . . . the governmental entity be insufficient because the messenger carrying the document . . . was ordinary rather than silver-winged."[221] However, the Colorado Supreme Court has ruled that service of notice by regular mail is insufficient unless it is timely received by the state.[222] In Colorado, the only method of service which warrants the presumption of receipt upon posting is certified mail, because it is designated by the Tort Claims Act notice statute.[223] A similar conclusion has been reached by a New Jersey appellate court.[224]

New York's highest court simply determined that legislative intent preserved a claim which, though filed by ordinary mail rather than the required certified mail, was timely received by the proper official.[225] These cases are not particularly relevant to our considerations, however, since the Mississippi method of delivery statute contains neither a savings statute nor any language regarding effectuating proof of timely delivery.[226]

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[218] *Id.* The court noted that "the margin for divergence from strict compliance is narrow." *Id.*

[219] COLO. REV. STAT. § 24-10-109(3) (1988). The statute provides that notice shall be written and "effective upon mailing by registered mail or upon personal service." *Id.* § 24-10-109(3).

[220] Blue v. Boss, 781 P.2d 128, 130 (Colo. Ct. App. 1989). The important fact is that "notice was timely filed." *Blue*, 781 P.2d at 130.

[221] *Blue*, 781 P.2d at 130; *accord* Woodsmall v. Regional Transp. Dist., 800 P.2d 63, 69 (Colo. 1990). The *Woodsmall* court stated that statutory mailing requirements were not "mandatory." *Woodsmall*, 800 P.2d at 69.

[222] Lopez v. Regional Transp. Dist., 916 P.2d 1187, 1191 (Colo. 1996). The statutory notice period in Colorado is one hundred and eighty days. COLO. REV. STAT. § 24-10-109(1) (1988).

[223] *Lopez*, 916 P.2d at 1191. The Colorado Supreme Court stated that appellate court decisions to the contrary were in error. *Id.*

[224] Zois v. New Jersey Sports & Exposition Auth., 670 A.2d 92, 93 (N.J. Super. Ct. App. Div. 1996). The *Zois* court stated that only the methods designated by the statute carried the presumption of notice upon posting. *Zois*, 670 A.2d at 93.

[225] Teresta v. City of New York, 108 N.E.2d 397, 398 (N.Y. 1952). The court concluded that the city waived its objection to the manner of service since it did not return the defective notice or complain of it until after trial had begun.

At least one court has held that an incarcerated inmate's inability to comply with certified mail requirements excused his delivery by regular mail.[227] That Indiana appellate court noted that incarceration was not, by itself, a basis for excusing an improper method of serving notice, but decided that a prisoner could make a factual showing of his incapacity "by virtue of his incarceration."[228] However, like the Colorado and New York Acts, the Indiana Tort Claims Act contains an unusual provision, which excuses non-compliance for incapacitation.[229] No such provision is included in Mississippi's Tort Claims Act.

Other courts in substantial compliance jurisdictions have refused to allow service by any other methods than those statutorily sanctioned. In *Lando v. City of Chicago*,[230] an Illinois appellate court held that service of a claim notice letter by ordinary mail did not substantially comply with the notice of claim requirements of the Local Government and Government Employees Immunity Act, which required personal service or service by registered or certified mail.[231] The court declared

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Teresta, 108 N.E.2d at 398. New York's legislature later amended the method of delivery statute to include a savings clause which validated noncomplying service if the defendant received actual notice and caused the plaintiff "'to be examined in regard to such claim.'" *Id.* at 397 n.1.

[226] MISS. CODE ANN. § 11-46-11(2) (Supp. 1995). However, the statute does provide that notice must be given ninety days before "maintaining action thereon." *Id.* § 11-46-11(1).

[227] McGill v. Indiana Dep't of Corrections, 636 N.E.2d 199, 204 (Ind. Ct. App. 1994). However, the court stated "a prisoner is not without resources in exercising his legal rights." *McGill*, 636 N.E.2d at 204.

[228] *McGill*, 636 N.E.2d at 204. The court held that where a prisoner demonstrates that he has "made a good faith effort to comply . . . and the purpose of the requirement has been satisfied," an extension of the filing deadline is warranted. *Id.*

[229] IND. CODE ANN. § 34-4-16.5-8 (Michie Supp. 1996). "If a person is incapacitated and cannot give notice as required . . . the person's claim is barred unless notice is filed within one hundred eighty (180) days after the incapacity is removed." *Id.*

[230] 470 N.E.2d 1172 (Ill. App. Ct. 1984).

[231] *Lando*, 470 N.E.2d at 1174-75. The court stated that actual notice alone did

that where a mandatory element of the Act had been entirely omitted, namely, service by an appropriate method, the doctrine of substantial compliance did not apply.[232]

In *Hammond v. City of Paterson*,[233] the New Jersey Superior Court determined that "the care and detail with which the Legislature" had taken in addressing the notice requirement evinced the intent that a public entity's receipt of tort claim notice was of fundamental importance, and held that the statutory requirements must be strictly followed.[234] Where the plaintiff lacked positive proof of actual receipt of the notice by the correct city officials and had no proof of personal delivery or certified mailing, the court had no choice but to bar the claim.[235]

It has also been held that service of claim notice by facsimile transmission (fax) does not suffice as written notice of claim to public entities.[236] The courts so ruling reasoned that the purpose of requiring personal delivery or certified mail was to assure service and provide proof of timely delivery, and fax transmittal did not satisfy that purpose.

Taking into account the mandatory "shall" language of the Mississippi Tort Claims Act notice provisions, the care and detail with which the Legislature addressed notice methods

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not meet the statutory standard. *Id.* at 1175. The court further stated that the goal of the notice requirement was that the public entity receive knowledge of pending litigation. *Id.* at 1174. *But see* Reynolds v. City of Tuscola, 270 N.E.2d 415, 416-17 (Ill. 1971) (holding "service by registered mail" constituted substantial compliance). The *Reynolds* court noted that timely and actual notice reached the appropriate city official. *Reynolds*, 270 N.E.2d at 417.

[232] *Lando*, 470 N.E.2d at 1175. The *Lando* court upheld the trial court's dismissal of the claimant's action "with prejudice." *Id.*

[233] 368 A.2d 373 (N.J. Super. Ct. App. Div. 1976).

[234] *Hammond*, 368 A.2d at 375. The claimant argued that notice sent by "ordinary mail" deserved a presumption of delivery. *Id.* The court responded that "no presumption of receipt arises from mailing by ordinary mail." *Id.* at 374-75.

[235] *Id.* at 375. The court stated that "statutory requirements for giving notice in a particular fashion must be strictly followed." *Id.*

[236] *In re* Marshall v. State, 544 N.Y.S.2d 437, 438 (N.Y. Ct. Cl. 1989). The plaintiff attempted to beat the statutory deadline by faxing notice to the Attorney General on the last day of the notice period, which was followed by personal service the next day. *In re Marshall*, 544 N.Y.S.2d at 437. The court stated that "the claim served by fax [was] without effect." *Id.* at 438.

and the general substantial compliance rule that all elements of notice provisions must be included in claims, the Mississippi Supreme Court, under the purview of substantial compliance with statutory purposes, would probably require service by the statutorily designated methods, excusing failures to utilize such methods only when the notices are nonetheless received by the proper official in a timely manner so as not to prejudice the public entity in any way.

4. *Complaint as Notice*

As previously noted, complaints-as-notice are rarely held sufficient in strict compliance states and they are often ruled insufficient by courts in substantial compliance states, particularly where the notice statutes contain mandatory, condition precedent ("shall") language.[237] Complaints do suffice as claim notice in a few substantial compliance states where (1) they contain the statutorily required information, (2) they are timely served upon the proper official and (3) where the notice provisions do not require a waiting period between serving notice and filing suit.[238]

Noting that the only notice of claim filed with the Virgin Island's government was the plaintiff's complaint, the Third Circuit Court of Appeals, in *Albert v. Abramson's Enterprises, Inc.*,[239] applying Virgin Islands Tort Claims Act law,[240] held that a "timely filed" complaint containing all statutorily required information, which was served on the statutorily designated official, satisfied the purposes of the notice requirements, i.e., notifying the government of a claim.[241] The Virgin Islands Act did not require a mandatory waiting period between filing of notice and institution of suit.

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[237] See Guzman v. City of Perth Amboy, 518 A.2d 758, 760 (N.J. Super. Ct. App. Div. 1986) (stating complaint was not "substitute for the notice required by statute"); *see also* Graffigna v. City of Philadelphia, 512 A.2d 91, 92-93 (Pa. Commw. Ct. 1986) (holding complaint-as-notice did not substantially comply with mandatory, "shall" language). The New Jersey statute provides that a claim "shall have been presented" in the statutory manner. N.J. STAT. ANN. § 59:8-3 (West 1992). *But see* Perello v. Woods, 485 A.2d 350, 354 (N.J. Super. Ct. Law Div. 1984) (holding third party complaint sufficient notice of claim). Allowing the complaint in *Perello* to act as notice satisfied the statutory purpose of avoiding litigation costs. *Perello*, 485 A.2d at 359.

[238] *See* Albert v. Abramson's Enters., 790 F.2d 380, 383 (3d Cir. 1986) (interpreting V.I. CODE ANN. tit. 33, § 3410 (1983)). The Third Circuit noted that this was a question of first impression under Virgin Islands law. *Albert*, 790 F.2d at 381.

[239] 790 F.2d 380 (3rd Cir. 1986).

[240] V.I. CODE ANN. tit. 33, § 3410 (1994). The notice statute states that a

In *Springer v. Seaman*,[242] a defamation action requiring the interpretation of Maine law, the federal district court ruled that a complaint, containing the statutorily required information and timely served upon the proper entity, substantially complied with Tort Claims Act notice requirements.[243] The court noted that the complaint, as drawn by the plaintiff, adequately notified the defendant of the particulars of the claim, afforded it an opportunity to investigate potential defenses and allowed time for settlement prior to trial,[244] particularly since there was no statutory mandatory waiting period between serving notice and filing suit.[245]

However, even in jurisdictions with no mandatory waiting periods between serving notice and filing suit, a different result is obtained where the complaint-as-notice does not include sufficient claim information[246] or is not served on the designated official.[247] In *J.A.W. v. State*,[248] the plaintiff served a

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"claim or notice . . . *shall* be filed . . . and a copy *shall* be served." *Id.* (emphasis added).

[241] *Albert*, 790 F.2d at 383. The *Albert* court stated that the "underlying purpose for requiring the filing of a claim or notice" had been fulfilled. *Id.*

[242] 658 F. Supp. 1502 (D. Me. 1987).

[243] *Springer*, 658 F. Supp. at 1512. The court noted that the claimant had not filed timely notice, but deferred ruling to allow the claimant an opportunity to show "good cause" why the deadline had not been met. *Id.*

[244] *Id.* The court emphasized that the plaintiff had the burden to prove "the facts essential to the Court's jurisdiction." *Id.*

[245] *Id.* The Maine Tort Claims Act notice provisions required service of a claim within one hundred eighty days of the injury and institution of suit within two years, but established no waiting period between those two acts. ME. REV. STAT. ANN. tit. 14, §§ 8107, 8110 (1964).

[246] Allbritton v. City of Birmingham, 150 So. 2d 717, 719-20 (Ala. 1963); *see also* Donohue v. State, 224 Cal. Rptr. 57, 62 (Cal. Ct. App. 1986) (holding failure to plead negligence in complaint-as-notice precluded reliance on theory at trial). "[T]here is no basis for application of the doctrine of substantial compliance in the present case." *Donohue*, 224 Cal. Rptr. at 62.

[247] *See* Saludes v. Ramos, 744 F.2d 992, 993-96 (3d Cir. 1984) (interpreting

copy of his draft complaint upon someone other than the official designated by the Indiana Tort Claims Act.[249] Observing that a draft complaint could conceivably serve as claim notice, the court concluded that the plaintiff's draft complaint was not served upon both designated officials and lacked several items of statutorily required information, including the amount of damages claimed and a statement of all negligence theories ultimately relied upon; thus, it did not satisfy the statutory purposes of pre-suit investigation and settlement.[250]

Nevertheless, where a complaint contains sufficient information and is properly served upon the designated official(s), it will ordinarily be ruled sufficient when there is no waiting period between serving claim notice and filing suit.[251] In Illinois, for example, the Local Government Immunity Act's notice provisions allow a claimant to file suit contemporaneously with the notice.[252] Accordingly, the Illinois courts have held that where no waiting period is required by the statute, a complaint may serve as notice since applicable discovery procedures make access to claim information more readily available to plaintiffs

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Virgin Islands law). The *Saludes* court noted that a conflict in the statutory notice provisions invited legislative action. *Saludes*, 744 F.2d at 995-96.

[248] 650 N.E.2d 1142 (Ind. Ct. App. 1995).

[249] *J.A.W.*, 650 N.E.2d at 1153 (citing IND. CODE § 34-4-16.5-6 (1986)). The Indiana statute contains mandatory, condition precedent language similar to the Mississippi statute, providing that a claimant "shall describe" the injurious event. IND. CODE ANN. § 34-4-16.5-9 (1986).

[250] *J.A.W.*, 650 N.E.2d at 1153-55. The court stated that if the requirements were fulfilled, then a "draft complaint, standing alone" could act as notice. *Id.* at 1153. However, in *J.A.W.*, the complaint alleged a civil rights violation rather than a tort claim. *Id.*

[251] *See Ex parte* City of Huntsville, 456 So. 2d 72, 73 (Ala. 1984) (relying on substantial compliance language found in statute to allow claim to act as notice), *overruled in part by* Diemert v. City of Mobile, 474 So. 2d 663 (Ala. 1985). The *Diemert* court held that a complaint need not be "sworn" to constitute notice. *Diemert*, 474 So. 2d at 666. However, the Circuit has held that under Wisconsin law, while a complaint may serve "as a notice of injury, [it cannot act] as a notice of claim," notwithstanding statutory substantial compliance and actual notice provisions. Medley v. City of Milwaukee, 969 F.2d 312, 320 (7th Cir. 1992) (citing WIS. STAT. ANN. § 893.80(1) (West 1993)).

[252] ILL. REV. STAT. ch. 85, ¶ 8-102 (1981) (repealed 1986). The repealed provision required notice within six months of injury. 745 ILL. COMP. STAT. ANN. 10/8-102 (West 1993).

than would otherwise be possible.[253]

On the other hand, where a notice statute contains a mandatory waiting period between notice and suit, complaints-as-notice do not ordinarily pass statutory muster.[254] As previously indicated, section 11-46-11 of the Mississippi Code requires a waiting period of ninety days between serving notice and filing suit.[255] Considering the mandatory "shall" language of Mississippi's notice provisions and the required ninety day waiting period between serving notice and filing suit, it is reasonable to assume that the Mississippi Supreme Court, even applying substantial compliance law, would align itself with the majority of such states and not allow complaints to suffice as Tort Claims Act notices of claims.

5. *Actual Notice*

Actual notice may be substituted for written notice of claim in a handful of substantial compliance states, either by virtue of legislative act[256] or judicial intervention. In *Kelly v. City of*

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[253] Rio v. Edward Hosp., 472 N.E.2d 421, 425 (Ill. 1984) (holding complaint serves as adequate claim notice); Dunbar v. Reiser, 356 N.E.2d 89, 91-92 (Ill. 1976) (holding complaint supplied actual notice of claim); *see also* Saragusa v. City of Chicago, 348 N.E.2d 176, 180-81 (Ill. 1976) (holding discovery process provides alternative to claim notice). The *Saragusa* court overruled a 1907 decision to the contrary. *Saragusa*, 348 N.E.2d at 180-81 (overruling Erford v. City of Peoria, 82 N.E. 374 (Ill. 1907)).

[254] See Davidson v. Bronx Mun. Hosp., 473 N.E.2d 761, 762-63 (N.Y. 1984) (holding notice is "condition precedent to a lawsuit against a municipal corporation"). In *Davidson*, the thirty-day period between notice and filing of complaint allowed the public entity time to investigate and decide whether to settle before incurring litigation costs. *Davidson*, 473 N.E.2d at 763. The court stated that filing of a complaint before serving notice would "frustrate" the legislative intent. *Id.*; *accord* Indiana Dep't of Pub. Welfare v. Clark, 478 N.E.2d 699, 703 (Ind. Ct. App. 1985) (favoring *Davidson* rationale over *Dunbar* and *Rio*). The Indiana court noted that Indiana's statute required a waiting period between service of notice and filing of suit. *Clark*, 478 N.E.2d at 703; *see also* Saranac Lake Cent. Sch. Dist. v. New York State Div. of Human Rights, 640 N.Y.S.2d 303, 304-05 (N.Y. App. Div. 1996) (holding complaint insufficient notice unless timely-filed).

[255] MISS. CODE ANN. § 11-46-11(1) (Supp. 1995). "[N]inety (90) days prior to maintaining an action thereon such person shall file a notice of claim . . . ." *Id.*

[256] *See, e.g.*, N.Y. GEN. MUN. LAW § 50-3(5) (McKinney 1986) (stating court should consider actual notice received in granting extension of filing deadline).

Rochester,[257] the Minnesota Supreme Court upheld the plaintiff's actual notice in a tort claims act case because (1) the court had previously declared Minnesota to be a substantial compliance state, (2) actual notice was served upon the statutorily designated official, and (3) the actual notice contained all information required by Minnesota's Tort Claims Act, thereby fulfilling the investigatory purposes of the notice statutes.[258]

Although some substantial compliance state courts allow actual notice to replace written notice, they do not allow it to suffice unless it is timely received by the proper official and contains all pertinent information required by the notice statute.[259] As the Mississippi Tort Claims Act does not provide for actual notice, the Mississippi Supreme Court should give it no application. However, if the Court aligns itself with the minority and allows compliance by actual notice, it should only do so in the instances when such notice is served upon the public entity's executive officer and contains each element of the information required by section 11-46-11(2).

6. *Waiver or Estoppel*

A majority of substantial compliance states do not apply the doctrines of estoppel and waiver to tort claims act notice provisions,[260] because the court will not allow unauthorized

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Tennessee had a similar provision at one time. TENN. CODE ANN. § 29-20-302 (1980) (repealed 1987).

[257] 231 N.W.2d 275 (Minn. 1975).

[258] *Kelly*, 231 N.W.2d at 277. The court noted that individual departments of the city government were able to share information. *Id.* The court reasoned that such an ability, coupled with the official's knowledge of the potential claim, satisfied the intent of the notice statute. *Id.*

[259] Kossak v. Stalling, 277 N.W.2d 30, 33 (Minn. 1979). The *Kossak* court stated that in automobile collision cases, a court may assume that the city government will receive actual notice of the accident. *Kossak*, 277 N.W.2d at 33; *see* Plumeau v. Yamhill County Sch. Dist., 907 F. Supp. 1423, 1434 (D. Or. 1995) (holding that in order to satisfy actual notice requirement, plaintiffs must have given notice to agent defending claim within scope of notice status).

[260] R.P. Davis, Annotation, *Waiver of, or Estoppel to Assert, Failure to Give Required Notice of Claim of Injury to Municipality, County, or other Governmental Agency or Body*, 65 A.L.R.2D 1278, 1280 (1959). Davis provides a comprehensive

public employees to waive the immunities and defenses enjoyed by municipalities, counties and states.[261]

Even in jurisdictions where the doctrines of waiver and estoppel have application to tort claims act notice provisions, plaintiffs must still prove all of the elements of those doctrines to excuse their failure to file timely notice.[262] The elements of estoppel in these cases are frequently held to be: (a) false representation by the defendant, with an awareness of the factual falsity of the representation; (b) intent that the representation be acted upon by the plaintiff, (c) plaintiff's ignorance of the true facts, and (d) plaintiff's good faith reliance to and change of position to his or her detriment.[263]

In *Christopher P. v. Mojave Unified School District*,[264] a California appellate court established a two-pronged test for the application of estoppel in tort claims notice controversies.[265] According to this well reasoned test, estoppel applies if (1) all the elements of the doctrine are present and (2) the misleading statements induce a reasonable person to avoid hiring counsel or commencing litigation, or indicate that statutory claim filing procedures need not be followed.[266]

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list of jurisdictions refusing to apply the doctrine of waiver to a notice statute. *Id.* at 1280-84; *see* Delaware Co. v. Powell, 382 N.E.2d 958, 960 (Ind. Ct. App. 1978) (stating majority view holds that notice provision "cannot be tolled nor waived"), *opinion superseded on other grounds*, 393 N.E.2d 190 (Ind. 1979).

[261] City of LaGrange v. USAA Ins. Co., 438 S.E.2d 137, 139 (Ga. Ct. App. 1993). The court in *LaGrange* reasoned that allowing a person to waive the city's rights would adversely affect the public interest. *City of LaGrange*, 438 S.E.2d at 139; *see* Menendez v. North Broward Hosp. Dist., 537 So. 2d 89, 90-91 (Fla. 1988) (holding that defendant agency could not waive notice requirement); Dreger v. New York State Thruway Auth., 609 N.E.2d 111, 112 (N.Y. 1992) (holding that no public entity could waive immunity where plaintiff failed to commence action in timely manner).

[262] Johnson v. San Diego Unified Sch. Dist., 266 Cal. Rptr. 187, 192 (Cal. Ct. App. 1990). The plaintiff has the burden of proving the elements of estoppel. *Johnson*, 266 Cal. Rptr. at 192.

[263] Willis v. City of Lincoln, 441 N.W.2d 846, 850-51 (Neb. 1989). The *Willis* court asserted that estoppel is an equitable doctrine which cannot be applied to municipalities unless justice demands. *Willis*, 441 N.W.2d at 850.

[264] 23 Cal. Rptr. 353 (Cal. Ct. App. 1993).

[265] *Christopher P.*, 23 Cal. Rptr. 2d at 357. The court noted that at the essence of estoppel is an affirmative act by the municipality. *Id.*

[266] *Id.* at 357. The court further cited intimidation of the plaintiff as a factor

However, it should be emphasized that the plaintiff's reliance must be reasonable. Some courts have even held that a claimant's lawyer's reliance upon a public entity's misrepresentations is per se unreasonable because the attorney should have read the notice statute.[267] It has also been held that, when a claimant discovers that he has been misled and still has time to serve notice upon the government but does not do so within the time remaining for effecting notice, the government will not be estopped from raising the defective notice defense.[268]

A significant factor in determining whether estoppel will apply to a state's tort claims act notice requirements is the statutory scheme itself. Claims notice statutes are usually one of four types: (1) jurisdictional requisite, (2) condition precedent, (3) procedural precedent or (4) limitation provisions. When a notice statute is a jurisdictional requisite, meaning it establishes a new cause of action against the state over which the courts lack subject matter jurisdiction where proper notice has not preceded suit, public entities and their employees cannot waive or be estopped from asserting the defective notice defense.[269] When the notice provision is a procedural precedent, waiver or estoppel may apply where the public entity fails to plead the defense of lack of notice in a timely fashion.[270]

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requiring estoppel. *Id.*

[267] Murphy v. Chicago Transit Auth., 548 N.E.2d 403, 405 (Ill. App. Ct. 1989). The *Murphy* court explained that the notice statute placed upon the plaintiff the burden of ascertaining his or her rights. *Murphy*, 548 N.E.2d at 405.

[268] Santee v. Santa Clara County Office of Educ., 269 Cal. Rptr. 605, 613 (Cal. Ct. App. 1990). The *Santee* court held that a plaintiff's failure to institute an action after he learned of the error precluded the use of estoppel. *Santee*, 269 Cal. Rptr. at 613.

[269] Jones v. University of Wash., 814 P.2d 1236, 1241 (Wash. Ct. App. 1991). A South Dakota court, similarly determined after finding it had jurisdiction based on South Dakota's sovereign immunity statute, that the defendant could raise the plaintiff's noncompliance as a defense. Cody v. Leapley, 476 N.W.2d 257, 260-62 (S.D. 1991).

[270] Delaware County v. Powell, 382 N.E.2d 958, 961 (Ind. Ct. App. 1978), *opinion superseded on other grounds*, 393 N.E.2d 190 (Ind. 1979). The *Powell* court compared the defense of improper notice to an affirmative defense to conclude that it must be raised in the pleadings. *Powell*, 382 N.E.2d at 961.

When a notice statute is a mere limitation upon the time for filing notice, meaning there are no strict requirements for notice except that it be filed within a specific time frame, then the requirements of the notice statute are easily subjected to estoppel and waiver on a number of theories.[271]

Of particular relevance to the question of application of waiver and estoppel in the context of the Mississippi Tort Claims Act is the fact that in states like Mississippi, where notice is a mandatory condition precedent to suits against the state and its political subdivisions, public entities are rarely estopped from raising the defective notice defense and then only when employees authorized to receive claim notice and/or settle claims mislead claimants about the requirements of the applicable claim notice statute.[272] In condition precedent jurisdictions, public entities are deemed to have waived mandatory notice requirements only upon proof of a clearly expressed intention to do so.[273]

Another significant factor in many estoppel cases is a plaintiff's diligence in attempting to comply with Tort Claims

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[271] Fredrichsen v. City of Lakewood, 491 P.2d 805, 806-08 (Cal. 1971). A municipality may waive its right to raise the defenses of estoppel and waiver just as it may waive its right to raise the statute of limitations. *Fredrichsen*, 491 P.2d at 806-08; *see* Dunbar v. Reiser, 356 N.E.2d 89, 91-92 (Ill. 1976) (holding substantial compliance satisfied intent of statute).

[272] Christopher P. v. Mojave Unified Sch. Dist., 23 Cal. Rptr. 2d 353, 357 (Cal. Ct. App. 1993). In *Christopher P.*, the court ruled that the county was estopped from raising the notice defense where a county employee took affirmative action to mislead the plaintiff. *Christopher P.*, 23 Cal. Rptr. at 357; *see* Gillingwater v. City of Valdosta, 339 S.E.2d 287, 288 (Ga. Ct. App. 1985) (holding estoppel did not apply where no authorized official received notice); Gonzalez v. Teskey, 465 N.W.2d 525, 530 (Wis. Ct. App. 1990) (holding that unfinalized settlement negotiations would not estop state from raising defense of defective notice absent any attempts to mislead claimant as to notice requirements). *But see* Simpson v. City of Pickens, 887 F. Supp. 126, 130 (S.D. Miss. 1995) (holding notice requirements are jurisdictional prerequisite); Lang v. City of Cumberland, 118 N.W.2d 114, 117-18 (Wis. 1962) (holding notice to unauthorized employee who misled plaintiff could estop defense of improper notice).

[273] Clark v. City of Smyrna, 442 S.E.2d 461, 462 (Ga. Ct. App. 1994). Even implied waiver of the notice requirement by unauthorized city employees is not sufficient to excuse the lack of written notice. *Clark*, 442 S.E.2d at 462; *see* Chesney v. Board of Educ., 153 N.Y.S.2d 683, 684 (N.Y. App. Div. 1956) (dismissing complaint due to invalid service).

Act notice provisions in the face of a public entity's bad faith efforts to thwart those attempts. In *Anske v. Borough of Palisades Park*,[274] the New Jersey Appellate Court held that since the borough thwarted the plaintiff's good faith effort to serve notice with the correct entity, it was estopped to raise the lack of notice defense.[275] Since the numerous conversations between the borough's insurance agent and the plaintiff, including the agent's statement that the claim "would be taken care of," served to fully notify the borough of the circumstances of the claim, the court reversed the summary judgment ruling for the borough.[276]

Similarly, in *Feinberg v. New Jersey Department of Environmental Protection*,[277] the New Jersey Supreme Court ruled that, although the plaintiff provided claim notice to the wrong state agency, she could file a late notice of claim with the correct agency because the defendants frustrated her diligent efforts to discover the correct state agency prior to filing notice.[278] Because of an obscure lease agreement between the two agencies, the court reasoned that the plaintiff could not have determined the identity of the proper agency for service of claims without being first informed by the state.[279] Noting that the state officials failed to enlighten the claimant and delayed answering her complaint and interrogatories until the time for filing notice of claim had lapsed, the court concluded that the plaintiff should not be impaled upon statutory technicalities in light of the defendant's dilatory tactics and that her notice to the wrong agency was tantamount to notice to the correct one under the specific factual circumstances of the case.[280]

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[274] 354 A.2d 87 (N.J. Super. Ct. App. Div. 1976).

[275] *Anske*, 354 A.2d at 91. The court considered the facts that the plaintiff personally reported the details of his accident to the borough clerk and provided all the information requested from him by the borough and its insurance carrier. *Id.* at 88; *see* 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 665 (1988) (discussing estoppel and its application where defendant fails to plead non-compliance); *cf.* Reale v. Township of Wayne, 332 A.2d 236, 239-40 (N.J. Super. Ct. Law Div. 1975) (holding municipality was not estopped from raising non-compliance as defense where plaintiff failed to give notice of any kind).

[276] *Anske*, 354 A.2d at 91. The court also noted the action of an unidentified city employee as contributing to the estoppel. *Id.*; *see* David L. Klinger & Gene Truncellito, *A Review of the New Jersey Tort Claims Act: Notice Provisions, Damages, and Third-Party Claims*, 2 SETON HALL LEGIS. J. 50, 59-60 (1976) (noting New Jersey statute precluded municipality from raising notice defense where deficiency is product of city's misinformation).

[277] 644 A.2d 593 (N.J. 1994).

[278] *Feinberg*, 644 A.2d at 597. The court allowed the plaintiff to proceed because she made a good faith effort to find the proper party to notify. *Id.*

[279] *Id.* Because the lease was unrecorded, the court did not charge the plaintiff with constructive knowledge of the relationship between the agencies. *Id.*

Where false representations are made by unauthorized persons, such as a public entity's insurance carrier, the government will not usually be estopped from raising the defense of lack of notice. Even in most substantial compliance states, unauthorized assurances to the effect that the claim "will be taken care of" do not serve to estop public entities unless those assurances were given under the cloak of clearly denoted agency authority[281] or with additional assurances that the tort claims act notice requirements need not be complied with.[282]

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[280] *Id.* The court focused heavily on the agency's dishonest actions as a basis for its liberal reading of the notice statute. *Id.*; *see* Marley v. Borough of Palmyra, 473 A.2d 554, 569 (N.J. Super. Ct. Law Div. 1983) (holding laches applied where entity waited for fifteen months to raise defense); Dambro v. Union County Park Comm'n, 327 A.2d 466,. 470 (N.J. Super. Ct. Law Div. 1974) (ruling municipality estopped from raising non-compliance as defense where tax assessor misled plaintiff about ownership of land).

[281] Peek v. City of Albany, 114 S.E.2d 451, 452-53 (Ga. Ct. App. 1960). In *Peek*, for instance, the plaintiff argued that the city was estopped from asserting lack of notice because the mayor told him that "the city would do the right thing" in response to his injury received from stepping on a negligently maintained meter box. *Peek*, 114 S.E.2d at 451-52. However, since the mayor had no authority to settle claims against the city and the complaint did not allege that the mayor was acting on behalf of the city, the court found neither estoppel nor waiver of notice. *Id.* at 453; *see* Repaskey v. Chicago Transit Auth., 326 N.E.2d 771, 772-73 (Ill. 1975) (finding no estoppel despite claim adjuster's accommodating statements where plaintiff gave no kind of notice); Coghill v. Badger, 418 N.E.2d 1201, 1209 (Ind. Ct. App. 1981) (holding mere investigation alone by city did not warrant estoppel); Fry v. Willamalane Park & Recreation Dist., 481 P.2d 648, 652-53 (Or. Ct. App. 1971) (finding plaintiff unjustified in relying on unauthorized official); *cf.* Brasher v. City of Birmingham, 341 So. 2d 137, 138 (Ala. 1976) (finding basis for estoppel where plaintiff's attorney filed notice of claim with mayor's office with request to forward notice to city's legal department).

[282] Anske v. Borough of Palisades Park, 354 A.2d 87, 91 (N.J. Super. Ct. App.

As for waiver, the courts are reluctant to apply the doctrine in a tort claims act notice context absent a clear and unequivocal expression that the plaintiff need not comply with notice provisions.[283] Even granted such a waiver, the question still remains as to whether or not the public employee purporting to waive notice requirements is authorized to do so. However, neither referral of a claim to an insurance agent nor initiation of investigation will waive claim notice requirements when a plaintiff has made no effort to serve notice upon the designated official.[284]

The question then, in the substantial compliance context, is whether the Mississippi Supreme Court will allow plaintiffs to utilize the equitable principles of waiver and estoppel to save an action instituted without first providing proper notice of claim. There are two reasons to believe that the answer may be in the affirmative. As has been previously noted in this article, Mississippi case law regarding the elements of estoppel and waiver is similar to the elements established by the New Jersey and California courts which have applied the doctrines in a tort claims act notice context. Secondly, in *Hellums v. Sheriff of Lee County*, Mississippi Northern District Judge Senter ruled that a public entity's counsel waived the defense of lack of notice by failing to make a timely objection thereto. Although the *Hellums* decision is not binding precedent, we may assume that, when he reached his decision, Judge Senter was cognizant of Mississippi waiver and estoppel law.

On the other hand, the Mississippi Supreme Court has held that the state and its agencies may not be estopped by the unauthorized acts of their employees,[285] and that a verbal

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Div. 1976). The court in *Anske* based its decision on the action of a city employee who misled the plaintiff. *Anske*, 354 A.2d at 91.

[283] Schoemaker v. Metropolitan Util. Dist., 515 N.W.2d 675, 680 (Neb. 1994). A court will not relax the notice standard primarily because the plaintiff was aware that he was not dealing with the proper official. *Schoemaker*, 515 N.W.2d at 680.

[284] Clark v. City of Smyrna, 442 S.E.2d 461, 461-62 (Ga. Ct. App. 1994). In *Clark*, the court's decision turned primarily upon the plaintiff's failure to submit written notification. *Clark*, 442 S.E.2d at 462; *see* Brown v. Portland Sch. Dist., 628 P.2d 1183, 1187 (Or. 1981) (holding waiver requires unequivocal act on part of city).

[285] Board of Educ. v. Hudson, 585 So. 2d 683, 688 (Miss. 1991). The court

statement by an unauthorized state employee does not warrant an estoppel against the state.[286] However, since estoppel is an affirmative matter which must be pled by one who asserts it,[287] the plaintiff who fails to raise the issue of estoppel in the complaint may not receive the full benefits of its saving grace.

Bearing this Mississippi precedent in mind, as well as precedent from substantial compliance states, it appears that the doctrines of estoppel and waiver should have very limited application in the Mississippi Tort Claims Act context. Furthermore, should an authorized employee intentionally deceive a claimant as to the application of the notice requirements to the claimant's case, and that claimant alleges estoppel or waiver in its complaint[288] based on its reliance on those representations to his or her detriment, then Mississippi's appellate courts may rule that those equitable doctrines have application in the claim notice milieu.

C. *Application of Notice Provisions to Third Party Actions, Cross-Claims or Counterclaims*

Tort claims act notice provisions are usually held to be applicable to all affirmative actions for damages against public entities, including third party actions and counterclaims. When

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characterized this idea as a well-settled principle of Mississippi Law. *Hudson*, 585 So. 2d at 688.

[286] Robert E. Ratliff Co. v. Mississippi State Highway Comm'n, 400 So. 2d 1211, 1214 (Miss. 1981). In a suit to remove a cloud from a title, the court applied this general rule of estoppel to a governmental body. *Robert E. Ratliff Co.*, 400 So. 2d at 1214.

[287] Brown v. Pittman, 51 So. 2d 732, 734 (Miss. 1951). Where the proponent of estoppel fails to prove its elements, the court will refuse to apply the doctrine. *Brown*, 51 So. 2d at 735.

[288] Hutchins v. Mills, 363 So. 2d 818, 821 (Fla. Dist. Ct. App. 1978). Where the plaintiff fails to plead estoppel, the case may be dismissed. *Hutchins*, 363 So. 2d at 821; *see* Munoz v. State, 39 Cal. Rptr. 2d 860, 861 (Cal. Ct. App. 1995) (dismissing estoppel claim because plaintiff failed to plead and prove elements of estoppel); Jones v. Northeast Durango Water Dist., 622 P.2d 92, 94 (Colo. Ct. App. 1980) (holding plaintiff could not cure complaint which failed to allege waiver); *see also* 57 AM. JUR. 2D *Municipal, County, School and State Tort Liability* § 665 (1988) (discussing necessity of pleading waiver or estoppel).

the action is primarily defensive in nature, however, as with a cross-claim or set-off, non-compliance with the notice provisions rarely bars a plaintiff's claim.

As for third party actions, many courts find them no less an "action" for purposes of tort claims act notice provisions than an original complaint, and apply tort claims act notice requirements to them.[289] Other courts emphasize the mandatory nature of the legislative language, i.e., notice "shall" be provided in "all actions," to require notice prior to a third party suit against a public entity.[290] Others simply note that an exception for third party actions could have been established legislatively, and enforce the notice provisions in third party actions in the absence of such legislation.[291]

In *Leppo v. State Highway Administration*,[292] the Maryland Supreme Court ruled that third party actions were not exempted from the state's notice requirements notwithstanding the general availability of the doctrine of substantial compliance, because the notice statute[293] established no such exemption.[294] The mandatory condition precedent language of the notice provisions, which made notice applicable to all actions except those specifically exempted by statute, figured prominently in the court's decision.[295]

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[289] Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1022 (Fla. 1979). Many courts view a third party claim for notice purposes as any other suit, thus requiring compliance with the applicable notice statute. *See* Berube v. City of Northampton, 602 N.E.2d 560, 562 (Mass. 1992) (stating that to allow separate action based on third party claim would defeat intent of notice statute); Beaver v. Pelett, 705 P.2d 1149, 1150-51 (Or. 1985) (applying notice statute to contribution claim. *But see* Sziber v. Stout, 358 N.W.2d 330, 341 (Mich. 1984) (holding notice statute inapplicable to actions for contribution).

[290] Morgan v. McDermott, 169 N.W.2d 897, 903-04 (Mich. 1969), *overruled by* Sziber v. Stout, 358 N.W.2d 330 (Mich. 1984). The language is a crucial factor in the construction of a notice statute in determining its scope. Leppo v. State Highway Admin., 624 A.2d 539, 542 (Md. 1993).

[291] Aiello v. Moore, 370 A.2d 74, 76 (N.J. Super. Ct. Law Div. 1976). The *Aiello* court denied the plaintiff's motion to amend the complaint because the time period for notice had expired. *Aiello*, 370 A.2d at 76.

[292] 624 A.2d 539 (Md. 1993).

[293] MD. CODE ANN.. [STATE GOV'T] § 12-106 (Supp. 1993).

[294] *Leppo*, 624 A.2d at 540-51. The court observed that third party claims were not included in the statutory exceptions though the legislature could have chosen to do so. *Id.*

Several exceptions to this general rule have evolved over the years. In *Marley v. Borough of Palmyra*,[296] the New Jersey Court excused a plaintiff's non-compliance with the state's Tort Claims Act notice provisions[297] on the basis of estoppel, where the state waited fifteen months before raising the issue of non-compliance, and the time limit for discovery and filing notice had run.[298]

Two courts have held that a third party plaintiff may rely upon the claim notice provided by the original plaintiff when both parties would have provided the same information in their claim notices,[299] but the Oregon Supreme Court reached the opposite conclusion because the Oregon notice statute[300] specifically provided that the suing party in all actions must himself provide the state with notice of claim.[301]

Will the Mississippi Supreme Court require third party plaintiffs to file ante-litem notice in Tort Claims Act cases? Since the Mississippi Tort Claims Act makes no exception for third party complaints and requires that "all actions" "shall"[302] be in compliance with the notice provisions, it is doubtful that the Court will judicially create such an exemption.

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[295] *Id.* at 541. *But see* McGrath v. Stanley, 493 N.E.2d 832, 835 (Mass. 1986) (upholding Massachusetts notice statute which specifically exempted third party actions); Coulson v. Larsen, 287 N.W.2d 754, 756 (Wis. 1980) (holding statutory language requiring injured person only to file claim notice evinced legislative intent not to require third party plaintiffs to file pre-suit notice in actions against state). However, it should be noted that section 11-46-11 of the Mississippi Code does not contain language similar to that found in the Massachusetts and Wisconsin statutes, which formed the basis for those courts' decisions to allow a third party plaintiff to disregard the notice provisions of tort claims acts. MISS. CODE ANN. § 11-46-11 (Supp. 1995).

[296] 473 A.2d 554 (N.J. Super. Ct. Law Div. 1983).

[297] N.J. STAT. ANN. § 59:8-8 (West 1972).

[298] *Marley*, 473 A.2d at 569. The court stated that the defendant's actions appeared to also be a waiver of the notice requirement. *Id.*

[299] White v. Johnson, 137 N.W.2d 674, 680 (Minn. 1965), *overruled on other grounds by* Tolbert v. Greer Indus., Inc., 255 N.W.2d 362 (Minn. 1977); Speer v. Armstrong, 402 A.2d 963, 966 (N.J. Super. Ct. App. Div. 1979). Both the courts in *White* and *Speer* reasoned that the intent of the notice statute was satisfied irrespective of which plaintiff gave notice. *White*, 137 N.W.2d at 680; *Speer*, 402 A.2d at 966.

[300] OR. REV. STAT. § 30.275 (1981).

[301] Leonard v. State Highway Dept., 630 P.2d 885, 888 (Or. Ct. App. 1981). The court held notice insufficient where a tortfeasor notified the state of its intention to seek immunity. *Leonard*, 730 P.2d at 888.

As for counterclaims, the overwhelming majority view is that, absent a legislative exception for counterclaims, tort claims act notice requirements fully apply.[303]

A few substantial compliance state courts have overlooked the "no exception" issue, focusing instead upon the statutory purposes of the notice provisions. In these jurisdictions, where the investigative purposes of those statutes have already been satisfied either by discovery proceedings or previous settlement negotiations with public entities, the courts have determined that additional claim notice need not be served prior to filing counterclaims against public entities.[304] But where the facts involving the counterclaim actions are different from those concerning the original action, a separate notice of claim is usually required prior to filing a counterclaim against a public entity.[305]

Mississippi, however, is a strict compliance state and its notice provisions do not exempt counterclaims from its Tort Claims Act notice requirements, which apply to "all actions" instituted against public entities.[306] Consequently, the Mississippi Supreme Court would probably require that all counterclaim plaintiffs serve notice on public entities prior to filing counterclaims against them.

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[302] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995).

[303] *See, e.g.*, Kansas Mun. Gas Agency v. Vesta Energy Co., 840 F. Supp. 814, 824 (D. Kan. 1993) (finding no basis in Kansas and Oklahoma notice statutes that notice requirement should not apply to counterclaim); People v. Superior Ct., 192 Cal. Rptr. 198, 202 (Cal. Ct. App. 1983) (holding notice statute applicable to "all claims"); Department of Transp. v. PSC Resources, Inc., 387 A.2d 393, 395 (N.J. 1978) (holding statutory notice requirement applied to counterclaims); *see also* Governmental Interinsurance Exch. v. Khayyata, 526 N.E.2d 745, 746 (Ind. Ct. App. 1988) (finding no distinction between claim and counterclaim); Russo Farms, Inc. v. Vineland Bd. of Educ., 675 A.2d 1077, 1088 (N.J. 1996) (holding plaintiff must give notice before filing counterclaim).

[304] Frank Briscoe Co. v. County of Clark, 643 F. Supp. 93, 102-03 (D. Nev. 1986). The court in *Frank Briscoe Co.* refused to deny the plaintiff's motion to amend its complaint merely because the plaintiff's notice was technically deficient. *Frank Briscoe Co.*, 643 F. Supp. at 103; *see* Perello v. Woods, 405 A.2d 350, 353 (N.J. Super. Ct. Law Div. 1984) (holding substance of notice more important than technicality); Urban Renewal Agency v. Lackey, 549 P.2d 657, 660 (Or. 1976) (holding substantial compliance may satisfy statutory requirement).

[305] Village of Southampton v. Platt, 389 N.Y.S.2d 625, 627 (N.Y. Sup. Ct. 1976). A separate notice of claim is required when a court refuses to interpret a notice statute too liberally. *Platt*, 389 N.Y.S.2d at 627.

Most courts are not so strict where cross-claims are involved. Since those actions are often deemed to be defensive in nature, and no purpose would be served by requiring additional notice when the parties have already instituted full scale investigations by the time the cross-claim is filed, the chance for presuit investigation has already been lost.[307] Accordingly, prior cross-claim notice is probably not required in Mississippi, since the state should be well advised of the circumstances of the claimant's injury via notice and discovery in the original action by the time a defensive cross-claim is filed against it. However, where certain factual aspects are raised for the first time by a cross-claim, or the cross-claim is an affirmative action for damages, the Supreme Court may follow stricter precedent[308] and uphold the notice requirement as to cross-claims since they are not exempted by the Act. On the other hand the Court may allow a cross-claimant the opportunity to assert any equitable set-offs she might otherwise be entitled to despite the fact that she failed to provide the proper notice of claim.[309]

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[306] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995).

[307] Krainock v. Superior Ct. 265 Cal. Rptr. 715, 717-18 (Cal. Ct. App. 1990). The *Krainock* court reasoned that the investigative purpose of the statute was satisfied by the filing of the initial complaint. *Krainock*, 265 Cal. Rptr. at 718; *see* Smith *ex rel* Smith v. Parks Manor, 243 Cal. Rptr. 256, 260 (Cal. Ct. App. 1988) (holding that no claim need be filed after indemnity claim accrues); Orange County v. Gipson, 539 So. 2d 526, 528-29 (Fla. Dist. Ct. App. 1989) (ruling notice not required where cross-claimant files against entity already party to suit)y. *But see* *Khayyata*, 526 N.E.2d at 746 (holding cross-claim barred by cross-claimant's failure to give notice to cross-claimee).

[308] Gehman v. Superior Ct., 158 Cal. Rptr. 62, 64 (Cal. Ct. App. 1979). Precedent indicates that notice is a condition precedent to filing a cross-claim. *Gehman*, 158 Cal. Rptr. at 64.

[309] *Khayyata*, 526 N.E.2d at 746. A counterclaim as an action for damages may be dismissed because of the lack of pre-suit notice and still remain viable as a setoff against the state's claim. *Id.*

D. Application of Notice Provisions to Federal Court § 1983 Actions

Tort claims act controversies often surface in federal court as pendant state tort claims attached to 42 U.S.C. § 1983 Civil Rights actions. In such cases, are tort claims act notice provisions applicable to § 1983 actions and their pendant state claims? Although the first question was once the source of heated debate in many federal circuits, the U.S. Supreme Court finally answered the question in the negative: notice of claim provisions of state tort claims acts are inapplicable to federal statutory or constitutional actions, such as those brought under Title VII or 42 U.S.C. §§ 1981 and 1983.[310] However, state common-law tort claims filed as pendant claims in federal court actions have universally been held subject to the notice requirements of state tort claims acts.[311]

E. Constitutionality of Notice Provisions

State tort claims act notice provisions are frequently challenged on constitutional grounds. Would Mississippi's notice of claim provisions[312] withstand such an attack? A perusal of available Mississippi precedent and decisions from other states reveals that the answer should be a resounding "yes."

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[310] Felder v. Casey, 487 U.S. 131, 153 (1988). The Supreme Court stated that notice statutes could not infringe upon the intent of civil rights legislation. *Felder*, 487 U.S. at 153.

[311] Miller v. Brungardt, 904 F. Supp. 1215, 1217 (D. Kan. 1995). In such situations, federal courts apply state statutes to those claims brought under state law. *Miller*, 904 F. Supp. at 1217; *see* Kamani v. Port of Houston Auth., 702 F.2d 612, 615 (5th Cir. 1983) (applying Texas notice requirements to maritime action); Kansas Mun. Gas Agency v. Vesta Energy Co., 840 F. Supp. 814, 823-24 (D. Kan. 1993) (applying Kansas law to incident which occurred in Oklahoma); Finley v. Siacobbe, 827 F. Supp. 215, 220 (S.D.N.Y. 1993) (applying notice statute to state human rights law); *see also* Robinette v. Johnston, 637 F. Supp. 922, 924-25 (M.D. Ga. 1986) (interpreting Georgia's statute of limitations in diversity action); Mui v. Dietz, 559 F. Supp. 485, 489-90 (N.D. Ill. 1983) (dismissing action in application of Illinois law); Mueller v. Penobscot Valley Hosp., 538 A.2d 294, 297-98 (Me. 1988) (holding Maine's notice statute applicable to tort action filed pendant to § 1983 action).

[312] MISS. CODE ANN. § 11-46-11 (Supp. 1995).

1. Public vs. Private Tortfeasors

Numerous constitutional challenges have been aimed at a seemingly harsh aspect of tort claims act law—claimants must serve pre-suit notice of claim on public tortfeasors or have their actions forever barred, while claimants against private tortfeasors must comply with no such requirements. This disparate treatment is not as harsh as it first appears; tort claims acts allow recovery where no such recovery previously existed and are classic examples of statutes that balance the competing interests of fairness to injured citizens with the need for protection of taxpayers' interests. They create a remedy for persons injured by public tortfeasors but limit that remedy to prevent the states from assuming an overbearing financial burden. Of course, fairness is not the issue; rather, the issue is constitutionality of claim notice statutes. The first step in examining the constitutionality of a statute is to determine which standard of review the courts must apply. Absent a fundamental right, i.e., voting, or a suspect class, i.e., race and gender, the courts will forego the strict scrutiny test and apply the less stringent rational basis test.[313]

a. The Rational Basis Test

In *Wells v. Panola County Board of Education*,[314] the Mississippi Supreme Court held that parties injured by a tortfeasor, public or private, are not a suspect class for purposes of a constitutional (equal protection or due process) analysis and that the right to sue the state is not fundamental.[315] Accordingly, the *Wells* court applied the rational basis test, instead of the strict scrutiny test, to a statutory scheme limiting the amount of damages that could be recovered in a tort suit against the state.[316] The court determined that, upon application of the rational basis test, the damage-limiting provisions of Mississippi's Accident Contingent Fund statute were rationally related to a proper legislative purpose—the conservation of scarce state financial resources.[317] The court concluded that the Act passed equal protection and due process muster, holding that Mississippi may, when waiving immunity, establish such procedural conditions precedent to suits against it as it desires, so long as those procedures have a rational connection to legitimate state purposes.[318]

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[313] Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983). The Supreme Court stated that classifications may be upheld only if "they bear a rational relation to a legitimate governmental purpose." *Regan*, 461 U.S. at 547; *see* Turrentine v. Brookhaven, Miss. Sch. Dist., 794 F. Supp. 620, 624 (S.D. Miss. 1992) (applying *Regan* to personal injury case in which statute limited city's liability).

[314] 645 So. 2d 883 (Miss. 1994).

[315] *Wells*, 645 So. 2d at 893. The plaintiff urged that the liability cap violated his equal protection rights. *Id.*

Two recent, as yet unpublished, Mississippi federal district court decisions have applied the *Wells* rationale to Mississippi Tort Claims Act notice provisions. In dismissing a plaintiff's pendent tort claims against a state employee in *Bairfield v. American Freightways, Inc.*,[319] Judge Barbour ruled that the Mississippi Tort Claims Act does not violate the equal protection or due process rights of claimants suing public tortfeasors, because there is no fundamental right to sue the state and such plaintiffs are not a suspect class.[320] Accordingly, Judge Barbour applied the rational basis test and concluded that Mississippi's notice provisions were rationally related to a legitimate governmental purpose—that of immunizing government employees from suit unless certain pre-suit procedures were followed.[321]

Dismissing a pendent Tort Claims Act suit in federal court for lack of proper claim notice and failure to file suit within the statute of limitations, Judge Pickering in *Clifton v. Landry*[322] declared that the notice and limitation provisions of the Act were constitutional.[323] Citing *Wells* and *Bairfield* as precedent for his decision, Judge Pickering stated that "[t]he provision waiving [sovereign] immunity must be complied with or there can be no action against the sovereign."[324]

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[316] *Id.* at 894. The state claimed that the rational basis for the statute was the state's interest in protecting itself from "500,000 potential claims per day." *Id.* at 893.

[317] *Id.* at 894. The court relied on reasoning that the basis was not so tenuous as to make the statute an "arbitrary exercise of government power." *Id.* (quoting Albritton v. City of Winona, 178 So. 799, 804 (1938)).

[318] *Id.* at 894. The court noted that conservation of the funds of a school district is a legitimate state interest. *Id.*

[319] No. 3:94-CV-744BN (S.D. Miss. Sept. 27, 1995) (Barbour, J., presiding).

[320] *Bairfield*, No. 3:94-CV-744BN, slip op. at 7-8. The court acknowledged the defendants' concession that a suspect classification was inappropriate. *Id.* at 8.

[321] *Id.* at 9. Judge Barbour cited the *Wells* decision in support of his position. *Id.* at 8.

Numerous state courts have offered similar reasons for upholding the constitutionality of tort claims act notice provisions. In *Johnson v. Maryland State Police*,[325] the Maryland Court of Appeals cited authority from twenty similarly-minded state courts to rule that the Maryland Tort Claims Act's notice statute was not unconstitutional. The court declared that since claimants in an action against public tortfeasors were not a suspect class, the rational basis test applied to their constitutional challenges.[326] The court concluded that the purpose of the notice provisions, that of allowing the state to make pre-suit decisions on settlement and take swifter remedial safety measures so as to avoid litigation costs to taxpayers, furnished a rational basis for differentiating between claims against public and private tortfeasors.[327] Additionally, the court declared that since the state had partially waived sovereign immunity, it could establish and implement prerequisites to such suits as it reasonably saw fit.[328]

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[322] No. 2:95-CV-266PS (S.D. Miss. Jan. 31, 1996) (Pickering, J., presiding).

[323] *Clifton*, No. 2:95-CV-266PS, slip op. at 3-4. "Sovereign immunity is firmly established in American jurisprudence." *Id.* at 4.

[324] *Id.* The opinion stated that "[p]laintiffs ha[d] cited no authority to the contrary." *Id.*

[325] 628 A.2d 162 (Md. 1993).

[326] *Johnson*, 628 A.2d at 165. The court noted that though the plaintiffs contended the classification was not rational, they did not allege that strict scrutiny was required. *Id.*

[327] *Id.* at 167. The court also recognized that the claim requirement allowed the state to predict its potential tort liability. *Id.*

[328] *Id.* at 166. Other courts have agreed with this contention. *See* Parton v. City of Huntsville, 362 So. 2d 898, 901 (Ala. 1978) (finding six-month claim requirement constitutional); Fritz v. Regents of the Univ. of Colo., 586 P.2d 23, 25 (Colo. 1978) (holding ninety-day requirement did not constitute equal protection violation).

b. *Equal Protection Challenges*

State courts that have considered equal protection challenges to tort claims act notice provisions have upheld those provisions based on four rationales: (1) a traditional rational basis analysis,[329] (2) the "equal footing" analysis, (3) the "procedural privilege" analysis and (4) a combination of (1) through (3).[330]

In regards to the "equal footing" issue, it should first be noted that some states, by fully abrogating sovereign immunity, sought to place claimants against public tortfeasors on the same footing as claimants against private tortfeasors. In these states, the courts have determined that claim notice provisions which drastically limit the time in which a plaintiff may file suit against public tortfeasors violate that plaintiff's equal protection rights.

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[329] *Johnson*, 628 P.2d at 167. In *Johnson*, the court held that Maryland's 180-day requirement provided rational grounds for differentiating between claims against the state and claims against private individuals. *Id.*; *accord* Sadler v. New Castle County, 524 A.2d 18, 25 (Del. Super. Ct. 1987) (finding statute constitutional so long as it was rationally relegated to legitimate objectives); Shoemaker v. Aldmor Management, Inc., 291 S.E.2d 549, 551 (Ga. 1982) (holding statute that prevented person from bringing personal injury suit against municipality within six months of occurrence of event constitutional); Newlan v. State, 535 P.2d 1348, 1351 (Idaho 1975) (holding equal protection test applied because statute did not create suspect class or infringe on fundamental right); Batchelder v. Haxby, 337 N.E.2d 887, 889-90 (Ind. Ct. App. 1975) (finding statute that required 60-day notice to government tortfeasor met rational basis test); Willis v. City of Lincoln, 441 N.W.2d 846, 851 (Neb. 1989) (holding notice of claim statute subject only to rational basis test); Campbell v. City of Lincoln, 240 N.W.2d 339, 344 (Neb. 1976) (finding neither notice of claim nor time requirements violated equal protection); Marrujo v. New Mexico Highway Transp. Dep't, 887 P.2d 747, 753-55 (N.M. 1994) (reaching result similar to Mississippi Supreme Court's holding in Wells v. Panola County Bd. of Educ., 645 So. 2d 883, 889 (Miss. 1994), using similar analysis); Reirdon v. Wilburton Bd. of Educ., 611 P.2d 239, 240 (Okla. 1980) (finding statute which furthers legitimate state interest not unconstitutional); Brown v. Portland Sch. Dist. No. 1, 617 P.2d 665, 668 (Or. Ct. App. 1980) (stating statutory notice requirements did not violate equal protection); Sears v. Southworth, 563 P.2d 192, 193 (Utah 1977) (holding Utah notice of claim requirement rationally related to state interests). See McAlister, *supra* note 155, at 471-76 for a discussion of the application of the rational basis test to state tort claims act notice provisions in the face of equal protection challenges.

[330] *Parton*, 362 So.2d at 900-01. The *Parton* court applied a multi-pronged equal protection analysis. *Id.*

A classic example of this reasoning may be found in the Michigan Supreme Court's decision of *Reich v. State Highway Department*,[331] in which that court struck down a statute requiring plaintiffs to give public tortfeasors notice of claim within sixty days of an injury. The court observed that the Michigan notice provision itself was a statute of limitations which violated the equal protection rights of plaintiffs suing public tortfeasors by not placing them on "equal footing" with plaintiffs suing private tortfeasors.[332] The court observed that the Michigan Tort Claims Act contained a clearly expressed legislative intent to place public and private tortfeasors' victims on an equal footing,[333] and declared that the notice provision did not furnish a rational basis for reaching the stated objective of equal footing for all claimants.[334]

However, the Mississippi Tort Claims Act is bereft of any expression of legislative intent to place all claimants against tortfeasors on an equal footing. To the contrary, the Act expressly states that public policy has always favored sovereign immunity[335] and that certain conditions precedent must be met prior to bringing tort claims actions against public tortfeasors.[336] Moreover, unlike the Michigan notice provision, the Mississippi version is not an additional statute of limitations; it is a condition precedent to suit which extends the statute of limitations by 95 days upon the plaintiff's filing of proper notice of claim.[337]

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[331] 194 N.W.2d 700 (Mich. 1972).

[332] *Reich*, 194 N.W.2d at 702. The Michigan notice requirement held plaintiffs suing public tortfeasors to a sixty day time period, while plaintiffs suing private tortfeasors were allowed to bring suit for three years. *Id.*

[333] *Id.* The court went on to note that the operation of the statute was in conflict with this legislative intent. *Id.*

[334] *Id.* The primary basis for the court's decision rested on the arbitrary treatment of different groups of plaintiffs. *Id.*

[335] MISS. CODE ANN. § 11-46-3 (Supp. 1995). The statute states that Mississippi and its "political subdivisions" are and have always been immune from suits at law or equity. *Id.*

[336] *Id.* § 11-46-11(2). The notice of claim must be "in writing, delivered in person or by registered mail . . . and contain a short and plain statement of the facts." *Id.*

When considering tort claims acts statutes similar to Mississippi's, courts have uniformly held that, absent an express intention to establish equal footing between public and private tortfeasors, state legislatures have wide discretion to establish notice of claim provisions which promote governmental investigation and settlement prior to incurring litigation expense. For example, in *Parton v. City of Huntsville*,[338] the Alabama Supreme Court refused to follow the *Reich* rationale, and declared that the Alabama legislature had not expressed an intent to establish equal footing for all claimants, since it had not given claimants against public tortfeasors an unconditional right to bring suit against the city. To the contrary, the legislature had "created a *conditional* right to sue [the city] in limited circumstances."[339] Observing that the notice requirements were an integral part of that "scheme," the court dismissed the plaintiff's equal protection challenge to the claim notice statute.[340]

As in Alabama, Mississippi's legislature has merely granted plaintiffs a conditional right to sue in certain instances and then only after following certain conditions precedent, including serving pre-suit notice of claim on a designated official. Accordingly, Mississippi's notice scheme should survive any equal protection challenge pursued on equal footing grounds.

As for the "procedural privilege" issue, there is Mississippi precedent which suggests that the claim notice scheme does not offend equal protection considerations.[341]

Similarly, other state courts have decided that since a state cannot be forced to allow suits against it, when it voluntarily does so, it may establish such conditions precedent to suit that it deems appropriate so long as those schemes are rationally related to a legitimate state purpose. In *Budahl v. Gordan & David Associates*,[342] the South Dakota Supreme Court held that the legislature's permission to sue may be accompanied by such terms as it wishes to impose, so long as those terms are related to a legitimate reason to require a shorter notice period.[343] The court determined that such legitimate reasons included investigation while the case was fresh, preparation of a defense, evaluation and settlement of meritorious claims, protection against irrational claims, facilitation of prompt repairs, avoidance of additional injuries, allowance for budgeting liabilities, and alerting officials of their "duty to act."[344] Financial and budgeting concerns have also constituted a proper basis for upholding claim notice statutes. In *Sadler v. New Castle County*,[345] the Delaware Supreme Court cited "maintenance of [the state's] fiscal stability [as a] legitimate state interest" in establishing conditions precedent to recovery under the state Tort Claims Act.[346]

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[337] *Id.* § 11-46-11(3).

[338] 362 So. 2d 898 (Ala. 1987).

[339] *Parton*, 362 So. 2d at 900. The court held that Alabama's "statutory scheme" created liability in limited circumstances. *Id.*

[340] *Id.* at 901. The court stated that limitations on this right are constitutional "when uniformly and equally applied." *Id.*

[341] *See supra* notes 315, 318, 320 and accompanying text. Both the *Wells* and *Bairfield* courts held that where Mississippi waives sovereign immunity, it may establish such conditions precedent to suits against it as it sees fit. *See supra* notes 315, 318 and accompanying text.

In *Wells*, the Mississippi Supreme Court determined that a statute similar to the Tort Claims Act was constitutionally acceptable in the face of an equal protection challenge.[347] Applying the rational basis test, the court ruled that preserving state funds was rationally related to a statute that limited the state's tort liability.[348] As the notice provisions of the current Tort Claims Act ultimately succeed in limiting Mississippi taxpayers' costs in needless litigation, thereby justifying the different treatment of classes of claimants against tortfeasors, there is every reason to believe that the Court will uphold them in the face of any equal protection challenge.[349]

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[342] 287 N.W.2d 489 (S.D. 1980).

[343] *Budahl*, 287 N.W.2d at 493. The court held that the legislature could control state liability within constitutional limits. *Id.*

[344] *Id.* at 492. The courts of several states have held that similar statutes do bear a reasonable relationship to a legitimate governmental purpose. *Id.*; *accord* Riddle v. Cain, 635 P.2d 394, 395 (Or. Ct. App. 1981) (holding notice statute reasonable).

[345] 524 A.2d 18 (Del. Super. Ct. 1987).

[346] *Sadler*, 524 A.2d at 25. The court also noted concern about the impact of increased tort liability as a legitimate state interest. *Id.*; *accord* King v. Johnson, 265 N.E.2d 874, 876 (Ill. 1970) (finding impact of tort liability on budgeting makes separate classifications of limitations acceptable); Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973) (holding prompt and thorough investigation of claims sufficient justification for notice requirement).

[347] *See supra* note 315 and accompanying text.

c. *Due Process Challenge*

Tort claims act notice provisions have also been challenged by claimants against public tortfeasors on due process grounds. For instance, in *Reich v. State Highway Department*, the plaintiffs argued that because the Michigan notice provision acted as a special statute of limitations by establishing an unreasonably short time (60 days from the injury) in which to institute suit against public tortfeasors, the statute violated their due process rights.[350] The Michigan court agreed and struck down the statute.[351]

However, the Michigan analysis is irrelevant for our purposes because Mississippi's Tort Claims Act notice provision does not establish an unreasonably short period of time in which to file notice. It merely states that claim notice must be filed ninety days prior to instituting suit.[352] As previously noted, the Act's statute of limitations requires the institution of suit within one year of the injury, then grants an additional ninety-five days to bring suit when notice of claim is filed within that year's time.[353] The notice provisions do not shorten the time for bringing an action, which would violate a plaintiff's due process rights, but extend the one year statute of limitations by an additional ninety-five days! Since Mississippi's notice provision is a condition precedent to suit only and not an unreasonably short statute of limitations, the Mississippi Supreme Court will, in all likelihood, reject any due process challenge levelled against those provisions.

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[348] *See supra* notes 316-17 and accompanying text.

[349] *See supra* notes 315-18 and accompanying text.

[350] Reich v. State Highway Dep't, 194 N.W.2d 700, 701-02 (Mich. 1972). The court analogized a minor's disability to that of a physically incapacitated plaintiff. *Reich*, 194 N.W.2d at 701-02.

[351] *Reich*, 194 N.W.2d at 702. The court cited the wide divergence in time granted to parties suing individuals as compared to parties suing the government as its basis for finding the statute unconstitutional. *Id.*; *accord* Turner v. Staggs, 510 P.2d 879, 882 (Nev. 1973) (holding six-month claim requirement violated equal protection); Hunter v. North Mason High Sch., 539 P.2d 845, 848-51 (Wash. 1975) (finding "nonclaim statutes" unconstitutional because they had no fair or rational relationship to governmental interest); O'Neil v. City of Parkersburg, 237 S.E.2d 504, 508 (W. Va. 1977) (stating that legislative act which arbitrarily establishes diverse treatment had no reasonable relationship to purposes of act); *see also* Daniel E. Feld, Annotation, *Modern Status of the Law as to Validity of Statutes or Ordinances Requiring Notice of Tort Claim Against Local Governmental Entity*, 59 A.L.R.3D 93, 109-17 (1974) (comparing conflicting authorities).

[352] MISS. CODE ANN. § 11-46-11(1) (Supp. 1995).

2. *Minors*

Tort claims act notice provisions have also been challenged by minors. The threshold issue is whether minors are exempt from the provisions. There is considerable precedent for the proposition that where a claim notice statute makes no exception for minors, they are not excused from complying with tort claims act notice requirements.[354]

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[353] *Id.* § 11-46-11(3).

[354] Harold D. Gordon, Note, *Notice of Claim Provisions: An Equal Protection Perspective*, 60 CORNELL L. REV. 417, 426 (1975); *see* City of Birmingham v. Weston, 172 So. 643, 645 (Ala. 1937) (finding minors not excused from complying with condition precedent notice requirements); Martin v. City of Beddeford, 568 A.2d 1103, 1105 (Me. 1990) (holding minor not excused from tort claims act's notice provision requirements where notice of claim statute made no exception for minors); Grover v. Martone, 485 N.Y.S.2d 191, 193 (N.Y. Sup. Ct. 1985) (finding minor not excused from complying with notice requirements); Montana v. New York, 466 N.Y.S.2d 436, 438 (N.Y. App. Div. 1983) (holding minor not excused from complying with notice requirement since minor's attorney was capable of protecting minor's legal rights); Perez v. Bay Area Hosp., 846 P.2d 405, 406-07 (Or. 1993) (finding minor not excused from complying with notice requirements); Fry v. Willamalane Park & Recreation Dist., 481 P.2d 648, 652 (Or. Ct. App. 1971) (holding minor's notice to governmental entity to be condition precedent to bringing tort claims action against entity); Ocampo v. City of Racine, 137 N.W.2d 477, 480 (Wis. 1965) (stating legislature has right to impose notice requirements upon minors because notice is condition precedent to bringing action and not unreasonable statute of limitations); *see also* Torres v. County of Los Angeles, 257 Cal. Rptr. 211, 217 (Cal. Ct. App. 1989) (finding medical malpractice action by minor against government accrues when parent or guardian learns of tortious act); Galloway v. City of Winchester, 184 S.W.2d 890, 892 (Ky. 1944) (stating

The North Dakota Supreme Court's decision in *Besette v. Enderlin School District No. 22*[355] is significant for its overview of national precedent regarding this issue. After examining both the minority and majority views on the subject, the court concluded that in states where sovereign immunity had been abolished by the legislature instead of by the courts, those legislatures preserved their right to establish certain conditions precedent to filing tort suits against the sovereign.[356] Where prior notice was made a condition precedent by virtue of the statutory usage of the word "shall," that requirement could also be imposed on minors so long as they were not specifically excluded from the requirement by the notice statute itself.[357]

Like North Dakota, Mississippi partially abolished sovereign immunity by legislative enactment.[358] Also, as previously noted, Mississippi's notice provisions are conditions precedent to filing suit for all claimants, not unreasonably short statutes of limitations on filing claims. By applying the *Besette* rationale to the Mississippi notice provisions, one must reach the conclusion that minors are not excused from complying with those

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notice statute applies to minor plaintiffs); George v. Town of Saugus, 474 N.E.2d 169, 171 (Mass. 1985) (finding statute which tolls statute of limitations for minors not applicable to requirements of Tort Claims Act); Elaine G. v. County of Westchester, 540 N.Y.S.2d 818, 818 (N.Y. App. Div. 1989) (holding court wrongly granted infant petitioner leave to serve notice of claim); Robinson v. City of Memphis, 105 S.W.2d 101, 102 (Tenn. 1937) (holding fact that plaintiff was minor is no excuse for failing to give proper notice). *But see* Wills v. Metz, 231 N.E.2d 628, 629-30 (Ill. App. Ct. 1967) (holding notice provisions of Local Governmental and Government Employees Tort Immunity Act not applicable to minor); City of Fort Wayne v. Cameron, 370 N.E.2d 338, 341 (Ind. 1977) (finding causal relationship between minority and late notice to be relevant).

[355] 288 N.W.2d 67 (N.D. 1980).

[356] *Besette*, 288 N.W.2d at 73-75. The court characterized the conditions as limitations upon the right to sue. *Id.* at 75.

[357] *Id.* The court noted that the legislature deemed it unjust to deprive minors of access to the court based on their parents' failure to comply with the statute and had specifically altered the requirements for minor plaintiffs. *Id.*

[358] Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1299 (Miss. 1992). The legislature's response relied on the decision of the court in Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), which "judicially abrogate[d] sovereign immunity." *Presley*, 608 So. 2d at 1291. The *Presley* court rejected the legislative attempt to resurrect pre-*Pruett* judicial sovereign immunity. *Id.* at 301.

provisions.

Having determined that minors are not excused from complying with Mississippi Tort Claims Act notice provisions, one must then ask if those provisions are unconstitutional as to minors. As with the claimants-against-public-tortfeasors dichotomy, the first step is to determine the correct standard of review.

a. Rational Basis Test

The same standard of review, the rational basis test, that applied to claimants against public tortfeasors also applies to minors since minors have no fundamental right to sue the government[359] and are not members of a suspect class.[360] The Mississippi Supreme Court has ruled that preserving limited state funds constitutes a rational exercise of legislative power to create valid classifications.[361] Thus, because Mississippi's Tort Claims Act notice provisions serve that purpose by avoiding litigation costs and repairing dangerous conditions,[362] the Mississippi Supreme Court should find those provisions constitutional as to minors.

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[359] Wells v. Panola County Bd. of Educ., 645 So. 2d 883, 893 (Miss. 1994). The *Wells* court found no "fundamental right to redress." *Wells*, 645 So. 2d at 893.

[360] Faucher v. City of Auburn, 465 A.2d 1120, 1124-25 (Me. 1983). Since age is not a suspect classification, a statute should be upheld if it bears a reasonable relation to its goals. *Faucher*, 465 A.2d at 1125; *see* Fry v. Willamalane Park & Recreation Dist., 481 P.2d 648, 652 (Or. 1971) (finding minors must comply with statute).

[361] *Wells*, 645 So. 2d at 894. Constitutionality exists where the legislative option is rationally related to legitimate goals. *Id.*; *see* Langevin v. City of Biddeford, 481 A.2d 495, 498 (Me. 1984) (holding reduction in time period rationally related to preservation of public funds).

[362] *Cf.* Johnson v. Maryland State Police, 628 A.2d 162, 165-68 (Md. 1993). The *Johnson* court held that avoiding litigation costs and correcting dangerous conditions are rationally related to tort claim act objectives of preserving state funds. *Johnson*, 628 A.2d at 168; *see* Hunnicutt v. City of Tuscaloosa, 337 So. 2d 346, 350 (Ala. 1976) (holding provisions reasonable). It cannot be seriously argued that Mississippi's notice provisions are intended to serve any purpose other than those articulated by the *Johnson* court—early investigation of claims, settlement prior to incurring litigation costs, and correction of dangerous conditions. *Johnson*, 628 A.2d at 167-68.

b. Equal Protection and Due Process Challenges

Constitutional challenges to tort claims act notice provisions have succeeded in a minority of jurisdictions when brought on behalf of minors. In *Tafoya v. Doe*,[363] the New Mexico Court of Appeals observed that since the state's notice provision operated as a separate statute of limitations by requiring claimants to institute suit within ninety days of injury, it had to be analyzed in conjunction with the general statute of limitations exceptions for minors in order to protect a minor's due process rights.[364] The court concluded that where such statutes did not provide for giving notice on an infant's behalf, a ninety day time period for filing notice violated a minor's due process rights.[365] However, in an earlier case, a New Mexico court held that incompetents' rights were not violated by claim notice provisions where a family member or legal counsel could file the notice for them.[366]

The *Tafoya* rationale should be rejected by the Mississippi Supreme Court for two reasons: (1) as previously noted, Mississippi's notice provisions are not unreasonably short statutes of limitations but are conditions precedent to suits against public entities which extend, not shorten, the statute of limitations on actions by ninety-five days and (2) in Mississippi, suits may be brought by a minor's next friend or guardian.[367]

Given that Mississippi courts will apply the rational basis test to minors' constitutional challenges to Mississippi's notice provision scheme, that numerous courts applying the rational basis test to similar provisions have found those schemes constitutional,[368] and that the *Wells* rationale is applicable to the Tort Claims Act, there can be little doubt that a minor's due process or equal protection challenge to Mississippi's notice provisions must be rejected by the Mississippi Supreme Court.

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[363] 670 P.2d 582 (N.M. Ct. App. 1983).

[364] *Tafoya*, 670 P.2d at 586. The court reasoned that a minor who is protected by the general statute of limitations deserved protection under the notice provisions as well. *Id.*

[365] *Id.* at 585. "In the absence of such a provision . . . providing for notice on the baby's behalf, application of the notice provision to the baby is unreasonable and violates due process." *Id.* at 586.

[366] Ferguson v. New Mexico State Highway Comm'n, 656 P.2d 244, 246-27 (N.M. Ct. App. 1982). The court held the notice requirement constitutional as applied because the incompetent's legal counsel was employed prior to the expiration of the time period. *Ferguson*, 656 P.2d at 246-47.

[367] MISS. CODE ANN. § 93-13-38 (Supp. 1996). Not only *may* a guardian bring suit on behalf of his ward, it is a guardian's *duty* to "improve the estate . . . and sue for and recover all debts due his said ward." *Id.* § 93-13-38(2).

III. STATUTE OF LIMITATIONS

Section 11-46-11(3) is Mississippi's Tort Claims Act statute of limitations, providing that all actions brought under the Act "shall be commenced within one (1) year . . . of the tortious, wrongful or otherwise actionable conduct" giving rise to the claim.[369] The one year period is mandatory, "notwithstanding the nature of the claim, . . . [the] characterization the claimant may use to describe it, . . . any other statute of limitations" that might otherwise apply but for the Act's provisions.[370] Subsection (3) also allows for the tolling of the statute of limitations for an additional period of ninety-five days upon filing notice of claim.[371] This allows a claimant to file notice of claim on the 365th day after the occurrence, attempt to settle the claim during the required ninety day waiting period[372] and, upon failing to do so, file the action within the next five days.

For limitations purposes, the first question is when does a cause of action accrue against Mississippi's public entities? Would an action accrue at the time of the plaintiff's injury or at some other time, such as when the claimant knows she has been injured by a state employee?

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[368] *See* Parton v. City of Huntsville, 362 So. 2d 898, 901 (Ala. 1978) (holding infancy is no excuse for failing to give notice unless expressly provided by statute). Many courts do not allow a claimant's status as a minor to affect the time period for notice. *Parton*, 362 So. 2d at 901; *see* Shearer v. Perry Community Sch. Dist., 236 N.W.2d 688, 693 (Iowa 1975) (ruling plaintiff's status as minor does not extend statute of limitations, so application does not violate equal protection); George v. Town of Saugus, 474 N.E.2d 169, 171-72 (Mass. 1985) (holding minority status does not extend statute of limitations); *see also* Robinson v. City of Memphis, 105 S.W.2d 101, 102 (Tenn. 1937) (holding minority has same obligation as adult with respect to notice requirements).

[369] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995).

[370] *Id.*

[371] *Id.*

[372] *See supra* note 255 and accompanying text.

A. *Time of Accrual*

Establishing the time for accrual of a cause of action is crucial in tort claims act cases because the courts have little or no discretion to excuse a plaintiff's failure to file claim or suit in a timely fashion.[373] The states are split on the time of accrual for tort claims act limitations purposes. For example, the California Tort Claims Act's limitations provision requires institution of suit within one year after the action "accrues."[374] In New Jersey, the time for filing suit also runs from the time of accrual,[375] but this has been judicially interpreted as the time of the injury-causing accident.[376] The Oregon Tort Claims Act limitations statute provides that an action accrues at the time of the "alleged loss or injury,"[377] and the Oregon courts have determined that the loss occurs on the date of the injury-causing accident.[378]

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[373] Iaconianni v. New Jersey Turnpike Auth., 565 A.2d 1084, 1086 (N.J. Super. Ct. App. Div. 1989). The *Iaconianni* court found no need to extend the filing period merely because the notice of claim was filed late. *Iaconianni,* 565 A.2d at 1086; *accord* Ramos v. City of Chicago, 707 F. Supp. 345, 347 (N.D. Ill. 1989) (dismissing tort claim filed against city one day after limitations period had run); Chase v. State, 136 Cal. Rptr. 833, 836 (Cal. Ct. App. 1977) (dismissing claim because plaintiff did not commence action within requisite time period); *In re* Roy, 362 A.2d 589, 591-92 (N.J. Super. Ct App. Div. 1976) (holding widower's failure to file claim within ninety-day notice requirement barred claim).

[374] CAL. GOV'T CODE § 911.2 (West 1995). California provides a six month time limitation in cases involving actions for death, injury to personal property or crops, and a one year limitation for all other actions. *Id.* The cause of action may accrue on the date of the injury, not the date of the claim rejection. Los Angeles City Sch. Dist. v. Superior Court, 88 Cal. Rptr. 286, 291 (Cal. Ct. App. 1970); *see* People *ex rel* Department of Transp. v. Superior Court, 608 P.2d 673, 676 (Cal. 1980) (finding cause of action that is barred against government because of statute of limitations does not bar claims against other defendants); Ro Jo Lo Partners v. State, 640 N.Y.S.2d 367, 368 (N.Y. App. Div. 1996) (holding plaintiff's cause of action accrued when extent of damages became ascertainable).

[375] N.J. STAT. ANN. § 859:8-1 (West 1995). "Accrual shall mean the date on which the claim accrued and shall not be affected by the notice provisions herein." *Id.*

[376] Fuller v. Rutgers State Univ., 381 A.2d 811, 813 (N.J. Super. Ct. App. Div. 1977). To the *Fuller* court, "accrual" indicated the date the accident occurred. *Fuller*, 381 A.2d at 813; *see* Servis v. State, 511 A.2d 1299, 1300 (N.J. Super. Ct. Law Div. 1986) (holding plaintiff's claim against state subject only to Tort Claims Act).

This latter view is probably indicative of the Mississippi Supreme Court's ultimate interpretation of the Tort Claims Act limitations statute, which provides that all actions must be brought "within one (1) year . . . of the tortious [act or omission]."[379] General Mississippi negligence law dictates that a cause of action accrues on the date of the tortious act,[380] and the Court will probably apply this rule to the Tort Claims Act milieu and pinpoint "accrual" at the time of injury.

Having established that a Mississippi Tort Claims Act action accrues at the time of the injury-causing occurrence, one must then ask if Mississippi courts will apply a discovery rule to the limitations provisions of the Act.

B. Discovery Rule

A "discovery rule" extends the time of accrual of an action for statute of limitations purposes from the time of occurrence to the time that the plaintiff knows or reasonably should know he has been injured by a specific tortfeasor. The Mississippi Supreme Court has applied the discovery rule to negligence cases involving latent injury or disease, such as medical malpractice or products liability cases.[381] The running of the statute is tolled until the plaintiff, through "reasonable diligence," is aware of both the injury and the causal act or omission.[382]

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[377] OR. REV. STAT. § 30.275(2)(a)-(b) (Supp. 1996). The statute provides a one-year time requirement for cases involving wrongful death and 180 days for all others. *Id.*

[378] Mann v. Department of Transp., 836 P.2d 1353, 1355 (Or. Ct. App. 1992). The statute does not toll while the plaintiff gathers enough facts to institute suit. *Mann*, 836 P.2d at 1355.

[379] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995). The one-year time requirement is extended ninety-five days with notice. *Id.*

[380] Vidrine v. Enger, 752 F.2d 107, 108 (5th Cir. 1984) (applying Mississippi law); Wilder v. St. Joseph Hosp., 82 So. 2d 651, 652 (Miss. 1955). Exceptions to this rule only arise in cases involving "fraudulent concealment" on the defendant's part. *Vidrine*, 752 F.2d at 108.

[381] Williams v. Kilgore, 618 So. 2d 51, 53 (Miss. 1992). In *Williams*, the Mississippi Supreme Court applied the discovery rule and concluded that the plaintiff's claim was not barred by the statute of limitations. *Williams*, 618 So. 2d at 53; *see* Smith v. Sanders, 485 So. 2d 1051, 1052 (Miss. 1986) (finding statute

Some state legislatures have mandated the application of the discovery rule to tort claims acts, especially in malpractice actions.[383] However, in jurisdictions where the legislatures have not specifically addressed this issue, the courts are divided on whether or not to apply a discovery rule in malpractice actions against government employees. Some apply the rule out of fairness to claimants with latent injury or disease,[384] while others refuse to do so in actions brought pursuant to special malpractice tort claims acts which make no provision for the rule,[385] or where the malpractice tort does not lead to a latent disease or injury.[386]

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did not begin to run until condition is or should have been discovered); *see also* MISS. CODE ANN. § 15-1-36 (1972) (declaring statute of limitations for malpractice actions).

[382] *Williams*, 618 So. 2d at 53; *Smith*, 485 So. 2d at 1052. The *Smith* court noted that under some circumstances, such an extension is required. *Smith*, 485 So. 2d at 1052-53.

[383] S.C. CODE ANN. § 15-78-110 (Supp. 1995). "[A]n action [must be] commenced within two years after the date the loss was or should have been discovered." *Id.*

[384] Moll v. Abbott Lab., 506 N.W.2d 816, 825 (Mich. 1993). The *Moll* court held that where the discovery rule applies, the statute begins to run when a reasonable person would begin to gather information as to who is at fault. *Moll*, 506 N.W.2d at 825; *see* Rio v. Edward Hosp., 472 N.E.2d 421, 424 (Ill. 1984) (finding discovery rule applies to medical malpractice cases and statute is tolled until plaintiff knows or reasonably should know of wrongfully caused injury); Vachon v. State, 514 N.W.2d 442, 445 (Iowa 1994) (stating discovery rule applies when statute uses word "accrued" and begins running when plaintiff may reasonably be charged with knowledge sufficient to trigger awareness of claim against particular defendant); Dinsky v. Town of Framingham, 438 N.E.2d 51, 52 (Mass. 1982) (interpreting "accrual" to mean time of plaintiff's discovery of injury).

[385] *See* Roberts v. Southwest Community Health Serv., 837 P.2d 442, 444-45 (N.M. 1992) (stating discovery rule applies only to general malpractice plaintiffs and not to those specifically included within purview of special Medical Malpractice Act); Desiga v. Scheffey, 874 S.W.2d 244, 247 (Tex. Ct. App. 1994) (finding that in cases under special Medical Liability Act statute of limitations runs from time of surgery, not from plaintiff's discovery of extent of his damages). "This statute effected a complete abrogation of the traditional discovery rule in medical malpractice cases." *Desiga*, 874 S.W.2d at 247.

[386] Estate of Hibbard v. Gordon, 826 P.2d 690, 697 (Wash. 1992) (en banc). In such cases, the discovery rule is inapplicable to a malpractice action against a

As for non-malpractice tort claims act cases, the courts are again divided as to the application of the discovery rule. The courts in favor of application usually follow a malpractice rationale, ruling that the non-discoverability of the injury requires application.[387] The courts which do not apply the rule abstain because there is no expressed legislative intent to require application of the discovery rule to the tort claims act, and do not wish to apply it through judicial legislation.[388]

Other courts determine application of the discovery rule in the tort claims act context on a case by case basis.[389] These courts apply the rule to toll the statute until the plaintiff knows someone generally is at fault, but not until the plaintiff is aware of the exact identity of the tortfeasor[390] or that the

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state employee that does not involve concealment issues. *Estate of Hibbard*, 826 P.2d at 697.

[387] Dowers Farms, Inc. v. Lake County, 607 P.2d 1361, 1366-67 (Or. 1980). One view is that application of the discovery rule is proper because the limitation period would otherwise be too narrow. *Dowers Farms, Inc.*, 607 P.2d at 1366-67.

[388] University of Tex. v. Greenhouse, 889 S.W.2d 427, 430 (Tex. Ct. App. 1994). The *Greenhouse* court held that the discovery rule was not applicable to tort claims act cases because the legislature did not affirmatively state that the rule was applicable. *Greenhouse*, 889 S.W.2d at 430; *see* Schaefer v. Mayor of Athens, 170 S.E.2d 339, 342 (Ga. Ct. App. 1969) (finding plaintiff's discovery regarding her prior injury did not extend time requirement); Farnum v. G.D. Searle & Co., 339 N.W.2d 392, 396 (Iowa 1984) (holding statute did not include discovery rule); Iaconianni v. New Jersey Turnkpike Auth., 565 A.2d 1084, 1086 (N.J. Super. Ct. App. Div. 1989) (finding discovery rule inapplicable to claim against turnpike authority).

[389] *See* Benner v. J.H. Lynch & Sons, Inc., 641 A.2d 332, 338 (R.I. 1994) (holding for discovery rule purposes that cause of action accrues in negligence actions against state at time of vehicular accidents on state highways despite fact that plaintiff did not know of state defendant's negligence until much later); Patrick v. Howard, 904 S.W.2d 941, 944 (Tex. App. 1995) (refusing to apply discovery rule to tort claim because plaintiffs knew of their injures at time of tortious act); Cart v. Marcum, 423 S.E.2d 644, 648 (W. Va. 1992) (declaring that discovery rule does not toll statute of limitations in tort claims act case where no great handicap to discovery of injury was caused by state defendant's misdeeds, and that ignorance of existence of cause of action or identity of wrongdoer does not prevent running of statute of limitations). These courts have used evidentiary considerations as the sole determining factor in the application of the discovery rule. *See* Stevenson v. Board of Regents, No. A-90-1077, 1992 WL 252727, at *5 (Neb. App. Oct. 6, 1992) (holding in unpublished opinion discovery rule inapplicable to tort claims act cases).

[390] *See* Amland Properties v. Aluminum Co. of America, 808 F. Supp. 1187,

tortfeasor is a public employee or entity.[391] Courts are in accord, however, in not applying the discovery rule when lack of diligence is the primary reason for the plaintiff's late filing.[392]

It is best, however, for courts to glean legislative intent from a tort claims act limitations provision rather than resorting to judicial legislation. The New Jersey Supreme Court, for example, in interpreting the New Jersey Tort Claims Act, which provided that public entities "shall only be liable . . . within the limitations of this act,"[393] ruled that, in light of that mandatory language excluding all other legal theories from the tort claims act realm and absent expressed legislative intent to apply the discovery rule to the Act, the discovery rule was inapplicable to all tort claims actions against public entities.[394]

Mississippi's Tort Claims Act makes no provision for the application of the discovery rule to negligence actions against public entities. Furthermore, the Act clearly states that "[t]he limitations period provided [in the Act] shall control and shall be exclusive . . . notwithstanding the nature of the claim . . . or the provisions of any other statute of limitations . . . ."[395] This exclusive mandatory language suggests legislative intent not to

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1190-91 (D.N.J. 1992) (interpreting New Jersey Tort Claims Act to hold that equitable discovery rule does not toll running of state tort claims act statute of limitations until identity of defendant is known).

[391] *See* Pilonero v. Township of Old Bridge, 566 A.2d 546, 550 (N.J. Super. Ct. App. Div. 1989) (holding discovery rule does not extend time for filing tort claims actions where plaintiff was unaware that state was responsible for injury). In *Pilonero*, the plaintiff knew that the town road was icy and was charged with the knowledge of the possibility of the city's liability. *Pilonero*, 566 A.2d at 550; *see also* Kramer v. Central Highway Dist., 889 P.2d 1112, 1115 (Idaho 1994) (refusing to toll statute of limitations where plaintiff was on county road and was aware of county in which injury occurred).

[392] *See* Fuller v. Rutgers State Univ., 381 A.2d 811, 813 (N.J. Super. Ct. App. Div. 1977) (holding discovery rule does not toll statute of limitations). In *Fuller*, claimant's grandmother was aware of the cause of action but did not hire an attorney until it was too late. *Fuller*, 381 A.2d at 813-14; *see Kramer*, 889 P.2d at 1115 (holding statute of limitations not tolled).

[393] N.J. STAT. ANN. § 59:1-1 to -7 (West 1992).

[394] Cancel v. Watson, 329 A.2d 596, 597 (N.J. Super. Ct. Law Div. 1974), *overruled by* Beretta v. Cannon, 524 A.2d 1070 (N.J. Super. Ct. Law Div. 1981).

[395] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995).

apply the discovery rule to the limitations provisions of the Act. Although this rule is applied to malpractice and products liability actions against private tortfeasors by virtue of section 15-1-39 of the Mississippi Code, absent legislative intent to apply it to such actions against public tortfeasors, the Mississippi Supreme Court may only do so by judicial legislation.

However, assuming *arguendo* that the Mississippi Supreme Court adjudicates the rule applicable to Tort Claims Act malpractice, products liability or other negligent acts or omissions causing latent disease of injury, the one year statute should be tolled no longer than the time that the plaintiff, through reasonable diligence, should have known of the injury and that it was caused by another person's negligent act or omission.

C. *Application of the Savings Statute*

Does section 15-1-59 of the Mississippi Code, which tolls statutes of limitations in favor of minority and other disabilities,[396] also toll the limitations provisions of the Tort Claims Act? Other courts have ruled that general savings statutes have no application to tort claims act provisions, declaring that the legislature could have made the general savings statute applicable to the Act had it chosen to do so.[397] Although

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[396] *Id.* § 15-1-59.

[397] *See* Farnum v. G.D. Searle & Co., 339 N.W.2d 392, 396 (Iowa 1984) (applying statute of limitations provided in Iowa's Tort Claims Act); George v. Town of Saugus, 474 N.E.2d 169, 171 (Mass. 1985) (refusing to toll statute of limitations where plaintiff was minor); Robbins v. City of Del City, 875 P.2d 1170, 1171 (Okla. Ct. App. 1994) (finding savings statute inapplicable to suits brought under Tort Claims Act); Nance v. City of Knoxville, 883 S.W.2d 629, 631-32 (Tenn. Ct. App. 1994) (stating rule that Tennessee's general savings statute does not apply in actions brought under Governmental Tort Liability Act); Williams v. Memphis Light, Gas & Water Div., 773 S.W.2d 522, 523 (Tenn. Ct. App. 1988) (noting no legislative intent to make savings statute applicable to actions brought under Governmental Tort Liability Act); Hatcher v. City of Galveston, 775 S.W.2d 37, 39 (Tex. App. 1989) (finding plaintiff's hospitalization sufficient disability to extend notice period).

But see Hernandez v. City of Boston, 474 N.E.2d 166, 168 (Mass. 1985) (espousing contrary view). The apparent contradiction in Massachusetts law of application of savings statutes to the Tort Claims Act is discussed at length in Joseph W. Glannon & Bennett S. Gordon, *Practice and Procedure Under the Massachu-*

the Mississippi Supreme Court has not specifically addressed this issue, the Court's decisions regarding similar issues reveals that it has not allowed general savings statutes to preempt the limitations provisions of special legislative acts. In *Cole v. State*,[398] Justice McRae, writing for the majority, declared that section 15-1-59 was not applicable to the Post Conviction Relief Act limitations provisions since section 15-1-59 made no mention of the Post Conviction Relief Act and the Post Conviction Relief Act made no mention of section 15-1-59.[399] In *Arender v. Smith County Hospital*,[400] Justice Walker opined that where the wrongful death limitations provision did not specifically allow for application of the savings statute, that statute did not apply to wrongful death actions.[401]

Mississippi's federal district courts have directly addressed this issue. In *Smith v. H.B. Allsup & Sons*,[402] the Southern District Court ruled that the Fair Labor Standards Act's statute of limitations was not subject to tolling by the savings provisions of section 15-1-59, apparently based on the fact that the Act included its own statute of limitations.[403] Later, in *Clifton v. Landry*,[404] Judge Pickering dismissed a minor's action for failure to comply with the Tort Claims Act's limitations provisions, declaring that there was no question that section 15-1-59 did not apply to Tort Claims Act cases.[405] As precedent for his decision, Judge Pickering cited *Cole* and *Arender*, noting that the clear language of the Act provided that the limitations statute was "exclusive" to all actions brought pursuant to the Act.[406]

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setts Tort Claims Act, 71 MASS. L. REV. 61, 65 (1986).

[398] 608 So. 2d 1313 (Miss. 1992).

[399] *Cole*, 608 So. 2d at 1313.

[400] 431 So. 2d 491 (Miss. 1983).

[401] *Arender*, 431 So. 2d at 492. The *Arender* court stated that where a statute does not include a savings clause, the court has no right to create one. *Id.* at 493.

[402] 718 F. Supp. 21 (S.D. Miss. 1989) (Lee, J., presiding).

[403] *Smith*, 718 F. Supp. at 22. The plaintiff in *Smith* claimed the statute of limitations was tolled by his minority. *Id.*

[404] No. 2:95-CV-266PS (S.D. Miss. Jan. 31, 1996) (Pickering, J., presiding).

[405] *Clifton*, No. 2:95-CV-266PS, slip op. at 4. The court also rejected the plaintiff's argument that the Tort Claims Act was unconstitutional. *Id.*

[406] *Id.*

In a particularly well-reasoned opinion, Mississippi Circuit Judge Kenneth Thomas ruled that since section 11-46-11 contained its own limitations provisions and excluded consideration of any other limitations law to Tort Claims Act cases, the Mississippi disability savings statute clearly had no application to Tort Claims Act limitations issues.[407]

It should be equally clear that section 15-1-59, the disability saving statute[408] is inapplicable to actions brought pursuant to the Mississippi Tort Claims Act. The only statute of limitations relevant to such actions is the one year provision of section 11-46-11(3) of the Mississippi Code.

D. Waiver and Estoppel

In Mississippi, estoppel has no application if it is not affirmatively pled by the one asserting it,[409] and unauthorized acts by state employees cannot estop the state from relying on its statute of limitations defense.[410] The Mississippi Supreme Court has also ruled that an administrator's acknowledgement of debt and promise of payment will not serve as the basis for estoppel.[411] In light of this cautious application of the equitable doctrine, is there any reason to expect Mississippi's highest court to apply estoppel and waiver in a Tort Claims Act statute of limitations context?

A majority of state courts have concluded that estoppel and waiver cannot be used to toll tort claims act statutes of limitations because the statutory language requiring institution of suit against a public entity within a certain period of time is mandatory on its face.[412] In California, where estoppel is applicable to its Tort Claims Act notice of claim controversies, a court has held that estoppel does not apply in matters concerning the Act's limitations provisions.[413]

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[407] Ross v. Splash Resort & Casino, Inc., No. 95-0169 (Tunica County Cir. Ct. Feb. 29, 1996); *accord* Harris v. Pat Harrison Waterway Dist., No. 96-0119 (Lamar County Cir. Ct. Oct. 1, 1996). In *Ross*, the suit also named the Mississippi Gaming Commission as a defendant. *Ross*, No. 95-0169, slip op. at 1.

[408] MISS. CODE ANN. § 15-1-59 (Supp. 1995).

[409] Brown v. Pittman, 51 So. 2d 732, 734 (Miss. 1951). The *Brown* court stated that estoppel was an "affirmative matter" and that "he who asserts it has the burden to establish the facts necessary to constitute it." *Brown*, 51 So. 2d at 734-35.

[410] Board of Educ. v. Hudson, 585 So. 2d 683, 688 (Miss. 1991). The Mississippi Supreme Court has held that unauthorized statements made by highway department employees do not constitute estoppel. Ratliff v. Mississippi State Highway Comm'n, 400 So. 2d 1211, 1214 (Miss. 1981).

[411] *See* Toler v. Wells, 130 So. 298, 301 (Miss. 1930). The only exception to this rule occurs when a defendant promises not to raise statutory limitations as a defense. Izard v. Mikell, 163 So. 498, 499 (Miss. 1935).

The courts in a minority of jurisdictions have applied estoppel in a limitations context in three instances, including: (1) when a public employee makes express representations that a claim will be settled without litigation,[414] but neither a public entity's request for more information[415] nor its employee's general assurances of settlement[416] will toll the statute by estoppel or unconcluded settlement negotiations;[417] (2) when a claimant is misled by assurances that the statute of limitations does not apply or need not be complied with on a particular occasion[418] and (3) when a defendant combines express and repeated admission of liability with a definite promise of payment or settlement.[419]

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[412] Hunter v. County of Los Angeles, 69 Cal. Rptr. 288, 289 (Cal. Ct. App. 1968). The *Hunter* court noted the county had not led the plaintiff to believe a late complaint could be filed. *Hunter*, 69 Cal. Rptr. at 289; Vines v. Self Mem'l Hosp., 443 S.E.2d 909 (S.C. 1993) (allowing statute of limitations defense); Oney v. Schrautz, 541 N.W.2d 229, 231-32 (Wis. Ct. App. 1995) (refusing to toll statute of limitations).

[413] Chase v. State, 136 Cal. App. 833, 835 (Cal. Ct. App. 1977). Estoppel is applicable to Tort Claims Act notice of claim controversies in California. *Chase*, 136 Cal. Rptr. at 835.

[414] Hart v. Bridges, 591 P.2d 1172, 1174 (Okla. 1979). A public entity's request for more information will not toll the statute by estoppel. Jarvis v. City of Stillwater, 732 P.2d 470, 472 (Okla. 1987); *see also* Allan E. Korpela, Annotation, *Promises to Settle or Perform as Estopping Reliance on Statute of Limitations*, 44 A.L.R.3D 482, 488-542 (1972) (discussing availability of equitable estoppel to plaintiff).

[415] Mansell v. Lawton, 901 P.2d 826, 831 (Okla. 1995). An entity's request for additional information does not imply an offer to settle. Doe v. Independent Sch. Dist., 780 P.2d 659, 661-62 (Okla. 1988); *see* Jarvis v. City of Stillwater, 732 P.2d 470, 472 (Okla. 1987) (noting request for additional information about plaintiff's medical expenses did not toll statute of limitations).

[416] Gibson v. Tulsa, 880 P.2d 429, 430 (Okla. Ct. App. 1994). The plaintiff in *Gibson* believed his claim would be settled if he would give the city time to investigate in reliance on the city's statements. *Gibson*, 880 P.2d at 429-30.

[417] *See* Vines v. Self Mem'l Hosp., 443 S.E.2d 909, 911 (S.C. 1993) (noting ongoing settlement negotiations would not toll statute by estoppel).

[418] Pangbourne v. New Jersey Dep't of Transp., 544 A.2d 423 (N.J. App. 1988);

Will the Mississippi Supreme Court adopt the minority rule and allow estoppel to apply in one the three aforementioned situations? In view of the mandatory wording of the Mississippi Tort Claims Act's limitations provisions,[420] estoppel should find little favor with the Court. If the Court does apply estoppel, it will likely do so only where an authorized official informs a claimant that the Act's limitation requirements need not be complied with or would not be raised as a defense, the claimant relies on those representations to his or her detriment, and then pleads estoppel in the complaint.

As for waiver, it has been held in at least one substantial compliance jurisdiction that a public entity may waive some benefits of a tort claims act's statute of limitations.[421] It has also been held that a public entity's failure to raise the limitations as an affirmative defense in its responsive pleading waives the defense.[422] However, in regards to statements made by employees of public entities, waiver does not ordinarily toll a tort claims act statute of limitations absent a clear expression of intent by one authorized to grant such a waiv-

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see Peterson v. Long, 519 N.Y.S.2d 201, 206 (N.Y. 1987) (applying rule in negligence claim by automobile passenger); Roberts v. Halton City, 543 S.W.2d 75, 76 (Tex. 1976) (stating assurances made by city manager to plaintiff did not estop city from asserting statute of limitations defense); *see also* Allan E. Korpela, Annotation, *Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations*, 43 A.L.R.3D 429, 439 (1972) (discussing effect of fraud on statute of limitations).

[419] Dupuis v. Van Natten, 402 N.Y.S.2d 242 (N.Y. App. 1978). The plaintiff in *Dupuis* also claimed fraudulent misrepresentation. *Dupuis*, 402 N.Y.S.2d at 243; *see also* Allan E. Korpela, *Agreement of Parties as Estopping Reliance on Statute of Limitations*, 43 A.L.R.3D 756, 799-80 (1972) (discussing agreements by implication).

[420] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995). "All actions . . . shall be commenced within one year" and "[t]he limitations period . . . shall be exclusive . . ." notwithstanding any other *"legal theory"* that would otherwise be applicable if not for the exclusive nature of the Tort Claims Act. *Id.* (emphasis added).

[421] Helle v. Brush, 292 N.E.2d 372, 373-75 (Ill. 1973). This waiver occurs when the public entity files suit against a party with an otherwise time-barred claim. *Helle*, 292 N.E.2d at 374-75.

[422] J.T. Millman v. County of Butler, 458 N.W.2d 207, 220 (Neb. 1990).

er.[423]

As the Mississippi Supreme Court has yet to determine who, if anyone, is authorized to waive the statute of limitations for Tort Claims Act purposes, a claimant's reliance upon on any such waiver, even if written, may be contrary to the legislature's expressed intent, as well as an abusing of the court's patience.[424]

Finally, a political subdivision's purchase of liability insurance has been held not to waive a Tort Claims Act statute of limitations,[425] so a Mississippi political subdivision's purchase of its own liability insurance[426] should not be judicially deemed a waiver of the limitations provisions of section 11-46-11(3) of the Mississippi Code.

E. Excusable Neglect

As previously noted, many state courts have ruled that Tort Claims Act statutes are in derogation of common law and must be strictly construed in terms of limiting the state's liability, and that all mandatory conditions precedent to suit established by the state's partial abrogation of sovereign immunity must be strictly complied with, including statutes of limitations. These courts have also held that where a plaintiff files suit beyond the time allowed by the statutes of limitations, the have no jurisdiction or discretion to excuse the late filing, despite ignorance, attorney mistake, or excusable neglect.[427]

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[423] Schoemaker v. Metropolitan Util. Dist., 515 N.W.2d 675, 680 (Neb. 1994). Clear and unequivocal intent establishes waiver. *Schoemaker*, 515 N.W.2d at 680.

[424] *See* WILLIAM SHAKESPEARE, THE MERRY WIVES OF WINDSOR.

[425] Robbins v. City of Del City, 875 P.2d 1170, 1171 (Okla. Ct. App. 1994). The *Robbins* court held that a municipality's purchase of liability insurance did not excuse the plaintiff from complying with the statute of limitations. *Robbins*, 875 P.2d at 1171.

[426] MISS. CODE. ANN. §§ 11-46-16 to -17 (Supp. 1995).

[427] *See* Guitterrez v, Mofid, 705 P.2d 886 (Cal. 1985) (refusing to postpone time for discovery of injury); Chase v. State, 136 Cal. Rptr. 833, 835 (Cal. Ct. App. 1977) (holding retroactive rule regarding statute of limitations does not apply to claim under Tort Claims Act); Todd v. County of Los Angeles, 141 Cal. Rptr. 622 (Cal. Ct. App. 1977) (refusing to take exception to statutory limit); Bell v. County of Camden, 370 A.2d 886, 888 (N.J. 1977) (holding statute of limitations not

For example, in *Chase v. State*,[428] a California appellate court held that even though the plaintiff did not discover the identity of the state defendant until after the statute of limitations had run, his action was barred.[429] The court based its decision on the use of the word "shall" in the Act,[430] stating that excusable neglect could never afford the court a basis to disregard the legislature's mandatory limitations requirements.[431]

In *Shroyer v. McCarthy*,[432] the Missouri Court of Appeals decided that excusable neglect could never be the basis for excusing a late filing of suit against the state.[433] The statute of limitations was not tolled while the plaintiff attempted to learn the identity of the state defendant, the court observed, in light of mandatory statutory language to the effect that suits "shall" be filed within two years of the occurrence.[434]

The Mississippi Supreme Court has held that mistake, ignorance of the law, and any other excuse apart from forcible restraint will not toll a statute of limitations.[435] Given this

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waived); Pinckney v. Jersey City, 355 A.2d 214, 217 (N.J. 1976) (refusing to vary from strict compliance with statute of limitations; Anya v. Vernon, 354 A.2d 338, 340 (N.J. 1976) (holding action time barred); Rose v. Metro N. Commuter Ry., 533 N.Y.S.2d 629 (N.Y. App. Div. 1988) (affirming lower court decision that action barred by statute of limitations); Cart v. Marcum, 423 S.E.2d 644, 648 (W. Va. App. 1992) (holding statute of limitations not tolled by discovery rule).

[428] 136 Cal. Rptr. 833 (Cal. Ct. App. 1977).

[429] *Chase*, 136 Cal. Rptr. at 835. The court reasoned that the Tort Claims Act filing requirements were mandatory and had to be strictly construed as protecting the state from liability. *Id.*

[430] CAL. GOV'T CODE §§ 900-997.6 (West 1995).

[431] Chase, 136 Cal. Rptr. at 835. Even though California allows the doctrine of excusable neglect to toll the time for filing a notice of claim, it will not allow an extension of time for filing suit on that basis, because of the mandatory "shall" language utilized in the California Tort Claims Act limitation provisions. *Id.*

[432] 769 S.W.2d 156 (Mo. Ct. App. 1989).

[433] *Shroyer*, 769 S.W.2d at 159. Absent wrongdoing on the part of the defendant, the plaintiffs' ignorance of his cause of action or identity of wrongdoer will not toll Tort Claims Act statute of limitations. Garabedian v. Skochko, 293 Cal. Rptr. 802 (Cal. Ct. App. 1991); *see also In re* Roy, 362 A.2d 589, 592 (N.J. App. 1976) (holding statute not tolled where plaintiff is aware that tortfeasor is public employee, but is unaware of employee's name).

[434] *Shroyer*, 769 S.W.2d at 159.

[435] Grenada County v. Nason, 165 So. 811, 813 (Miss. 1936). These holdings

precedent and the reluctance shown by other states to excuse non-compliance with mandatory limitations language similar to Mississippi's,[436] it is doubtful that the Mississippi Supreme Court will sanction excusable neglect as a basis to excuse an untimely filed suit in a Tort Claims Act case.

F. Application of Limitations Provisions to Third Party Actions, Cross-Claims and Counterclaims

Where state Tort Claims Acts contain "all remedies" clauses, wherein the limitations and notice provisions apply to all actions brought against public entities, courts have usually determined that the same limitations requirements which apply to original actions against public entities also apply to third party actions against public entities.[437] This same rule of law has also been applied to counterclaims.[438]

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include excuses of mistake and ignorance of the law. Mitchell v. Town of Magee, 51 So. 2d 198, 199 (Miss. 1951); *see* Howard v. Sun Oil Co., 404 F.2d 596, 600 (5th Cir. 1968) (applying Mississippi law in refusing to toll statute); Stevens v. Lake, 615 So. 2d 1177, 1181 (Miss. 1993) (refusing to toll statute of limitations).

[436] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995).

[437] Svorka v. Town of Greenwich, No. CV90 01-09738, 1993 WL 242320, at *1 (Conn. Super. Ct. Jun. 24, 1993); *see also* Leppo v. State Highway Admin., 624 A.2d 539, 542 (Md. 1993) (holding where plain language of Tort Claims Act makes no special exceptions for third party practice, court must decline to make judicial exception). Some courts refuse to accept time for filing as when plaintiff discovers injury. Prosco v. Servicemaster, Inc., No. 255264, 1992 WL 239033, at *2 (Conn. Super. Ct. Sept. 16, 1991). *But see* Haupt v. State, 667 A.2d 179, 184 (Md. App. 1995) (holding where Tort Claims Act provision contains no "all remedies" clause, cause of action accrues for third party actions against state at time third party defendant is served with original complaint).

[438] *See* De Los Santos v. Southwest Tex. Methodist Hosp., 802 S.W.2d 749, 752 (Tex. App. 1990) (holding general statute which allowed filing of time-barred counterclaims inapplicable to tort claims statute); *see also* Di Norscia v. Tibbett, 124 A.2d 715, 716-17 (Del. 1956) (holding where statute provides that "No action . . . shall be brought after the expiration of 1 year . . ." the court must rule that, in absence of legislation establishing different limitations for counterclaims against state, tort claims act limitations apply to "any action for personal injuries" against state); *see generally* Annotation, *Commencement of Action as Suspending Running of Limitation Against Claim Which is Subject of Setoff, Counterclaim, or Recoupment*, 127 A.L.R. 909 (1940) (discussing application of statutes of limitations counterclaims); 54 C.J.S. *Limitations of Action* § 285 (1987) (discussing demurrer of plea of statute of limitations).

The Mississippi Tort Claims Act contains a mandatory "all remedies" clause which provides that "all actions brought under this chapter shall be commenced within one year . . . of the [tortious act or omission]."[439] Accordingly, the Mississippi Supreme Court will likely apply the Act's limitations provisions to all affirmative actions brought thereunder, including third party actions, counterclaims and affirmative cross-claims for damages. However, where a cross-claim is brought solely as a defensive action, the limitations applicable to original and affirmative actions may not apply.[440]

G. Constitutionality of Limitation Provisions

Tort Claims Act limitations provisions have been frequently challenged on constitutional grounds but, more often than not, have been upheld. A recent challenge to Mississippi's Tort Claims Act limitations provisions arose in *Clifton v. Landry*[441] but received an unfavorable ruling. In *Clifton*, Judge Pickering cited the Mississippi Supreme Court's decision in *Wells v. Panola County Board of Education*[442] as precedent for his decision, and ruled that the limitations provisions of the Mississippi Tort Claims Act were established as a part of Mississippi's waiver of sovereign immunity, such that all actions against the state were limited by the provisions established in concordance with Mississippi's voluntary waiver.[443]

1. Generally

Other state courts have applied the *Wells* rational basis test to Tort Claims Act limitations provisions and determined that those provisions, which reduced the time in which claimants could file suit against public tortfeasors, were rationally related to the Acts' objective of preserving scarce state funds.[444] These courts have also rejected constitutional challenges from minors pursuant to a rational basis test analysis,[445] a procedural privilege analysis,[446] and an equal footing analysis.[447]

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[439] MISS. CODE ANN. § 11-46-11(3) (Supp. 1995).

[440] Gerald v. Foster, 168 So. 2d 518, 524 (Miss. 1964). The *Gerald* court held that a counter-action barred by the statute of limitations could still be maintained as a set off. *Gerald*, 168 So. 2d at 524.

[441] No. 2:95-CV-266PS (S.D. Miss. Jan. 31, 1996) (Pickering, J., presiding).

[442] 645 So. 2d 883 (Miss. 1994).

[443] *Clifton*, No. 2:95-CV-266PS, slip op. at 3-4. Judge Pickering noted, "[s]overeign immunity is firmly established in American jurisprudence," and provides protection for the sovereign unless it is waived. *Id.* at 4.

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[444] *See* Dias v. Eden Township Hosp. Dist., 370 P.2d 334, 335 (Cal. 1962) (noting importance of Tort Claims Act notice provisions to local public entity); Sadler v. New Castle County, 524 A.2d 18, 24 (Del. 1987) (holding those suing public tortfeasors are not suspect class, rational basis test is applicable to equal protection challenges and state's fiscal concerns constitute rational basis for shorter limitations period in suits against public tortfeasors); Hearn v. Massachusetts Bay Transp. Auth., 450 N.E.2d 602, 604 (Mass. 1983) (holding requirement valid that claims against transit authority be made within time limits of Tort Claims Act); State v. S.S. Kresge, Inc., 364 A.2d 868, 872 (Me. 1976) (holding legislature has broad discretion to enact laws that affect different groups differently so long as classification has rational relationship to achievement of objective); Murphy v. Richland Mem'l Hosp., 455 S.E.2d 688, 690 (S.C. 1995) (applying rational basis test to find state's decision to minimize undue burden to state entities caused by late-filed claims was rational basis for limitation).

[445] Jaramillo v. State, 809 P.2d 636, 638-41 (N.M. App. 1991). The *Jaramillo* court held minors are not a suspect class and have no fundamental right to sue the state, and further, that the state's two year statute of limitations had a rational relation to the objective of controlling its liabilities. *Jaramillo*, 809 P.2d at 638-41; *see also* Reese v. Rankin Fite Mem'l Hosp., 403 So. 2d 158, 160 (Ala. 1981) (holding state's desire to insure availability of affordable medical insurance to public was rational basis for establishing limitation period for minors); Gauthreaux v. Rheem Mfg. Co., 588 So. 2d 723, 725 (La. Ct. App. 1992) (ruling rational basis test satisfied by state's interest in promoting justice by enforcing shorter limitations period for actions against state); Langevin v. City of Bedford, 481 A.2d 495, 499 (Me. 1984) (applying rational basis test to assure availability of affordable insurance provided rational basis for having shorter period of limitations for suits against government); Fitts v. City of Beaumont, 688 SW.2d 182, 184 (Tex. App. 1985) (declaring reasonable statutory purpose of pre-suit opportunity to investigate satisfies rational basis test).

Other courts have applied similar reasoning to dram shop acts. Rohrabaugh v. Wagoner, 413 N.E.2d 891, 894-95 (Ind. 1980); *see* Barrio v. San Manuel Div. Hosp., 692 P.2d 290, 295 (Az. Ct. App. 1983) (insuring good public health care meets rational basis test); Smith v. Cobb County, 423 S.E.2d 235, 237 (Ga. 1992) (rebutting equal protection and due process challenges with rational basis test and holding medical and insurance cost rational basis for shortening time to sue); Dowd v. Rayner, 655 A.2d 679, 683 (R.I. 1995) (holding restriction on number of suits against healthcare providers to be rational purpose).

[446] Budahl v. Gordan & David Assocs., 287 N.W.2d 489, 493 (S.D. 1980). The South Dakota Supreme Court has held that the legislature's permission to sue may be accompanied by such terms as it wishes to impose. *Budahl*, 287 N.W.2d at 493.

In light of this overwhelming precedent in favor of the constitutionality of Tort Claims Act limitation provisions, there is little doubt that the Mississippi Supreme Court will extend its *Wells* rationale to the Tort Claims Act and uphold the constitutionality of the Act's limitations provisions.

H. Saving Statute for Minors

Is Mississippi's Tort Claims Act unconstitutional as to minors because it does not take Mississippi's general savings statute for minors into account? At least one state court has answered that question in the negative. Applying the rational basis test to a minor's equal protection and due process challenges to the Iowa Tort Claims Act limitations provisions,[448] which did not apply the state's general savings clause in minor's actions against the state, the Iowa Supreme Court in *Harden v. State*,[449] ruled that the savings statute[450] did not apply because it was found outside the specific Tort Claims Act statute of limitations.[451] The court first noted that minors suing the government were not a suspect class and that minors had no fundamental right to sue the state, and then held that, pursuant to the rational basis test, the inapplicability of the savings statute to the Act's limitations did not violate the minor's equal protection or due process rights because the State had a rational basis for not applying the savings statute to the Tort Claims Act suits of minors.[452]

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[447] *See* Stanley v. City of San Francisco, 121 Cal. Rptr. 842, 846 (Cal. Dist. Ct. App. 1975) (holding that pursuant to rational basis test, minor's equal protection and due process rights are not violated by Tort Claims Act limitations statute). The *Stanley* court distinguished the Michigan tort claims scheme which, on its face, created a new tort liability and purported to place all plaintiffs on equal footing, from the California scheme which merely waived sovereign immunity similar to the Mississippi Tort Claims Act. *Stanley*, 121 Cal. Rptr. at 846.

[448] IOWA CODE § 669.33 (West Supp. 1996). "[E]very claim" is barred under Iowa's Act unless brought within the time allowed by the limitations statute. *Id.*

[449] 434 N.W.2d 881 (Iowa 1989).

[450] IOWA CODE § 614.8 (West 1988). Section 614.8 tolls the general statutes of limitations for minors and mentally ill persons until after one year from the removal of the disability. *Id.*

[451] *Harden*, 434 N.W.2d at 884.

A similar constitutional challenge was made in the Southern District of Mississippi in *Clifton v. Landry*[453] The plaintiffs contended that the Mississippi Tort Claims Act was unconstitutional as to minors because the general savings statute[454] was not included in the Act's limitations requirements. Noting that "a minimal amount of legal research would have shown the Plaintiffs that all of their arguments are contrary to Mississippi law,"[455] Judge Pickering stated that there was "no question" that the savings statute did not apply to the Act, and that the limitations provisions of the Act did not violate the minor plaintiff's constitutional rights.[456]

It is doubtful that the Mississippi Supreme Court will issue a contrary opinion in this regard, given its ruling in the *Wells* case. The Mississippi Tort Claims Act statute of limitations will not be found wanting for lack of application of the general savings statute for minors.

IV. CONCLUSION

Despite a lack of guidance from the Mississippi Supreme Court regarding these issues, there is an abundance of precedent regarding Tort Claims Act procedural issues in other states with Tort Claims Acts worded similarly to Mississippi's. Given that precedent and the mandatory wording of section 11-46-11 of the Mississippi Code, Mississippi's federal district court judges, in interpreting the Act, have had little difficulty determining that its mandatory language requires strict compliance with the notice and limitations provisions.

Until Mississippi's highest court determines otherwise, counsel instituting suit against Mississippi public entities should make a diligent effort to strictly comply with the provisions of section 11-46-11, while counsel defending those suits should be prompt in making any objections to improperly served claim notices. These actions should be taken not only because Mississippi is very likely a strict compliance state but also because the Mississippi Legislature drafted section 11-46-11 in such a manner that it should withstand any constitutional challenges to its notice and limitations provisions.

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[452] *Id.* at 885-86. The state's basis included the prevention of state claims, the settlement of valid claims prior to suit and budget planning. *Id.*

[453] No. 2:95-CV-266PS (S.D. Miss. Jan. 31, 1996) (Pickering, J., presiding).

[454] MISS. CODE ANN. § 15-1-59 (1972). Section 15-1-59 grants additional time for minors and other disabled plaintiffs to file suits in tort cases. *Id.*

[455] *Clifton*, No. 2:95-CV-266PS, slip op. at 3.

[456] *Id.* at 4.

COMMENT

HEDONIC DAMAGES: A VARIATION IN PATHS, THE QUESTIONABLE EXPERT AND A RECOMMENDATION FOR CLARITY IN MISSISSIPPI[*]

Lex plus laudatur quendo ratione probatur.[**]

I. INTRODUCTION

In recent years, the potential for hedonic damage awards in torts actions has received increasing attention by legal scholars and practitioners.[1] While the term "hedonic damages"[2] is relatively new, American jurisprudence has long recognized the legal theory.[3] As a form of general damages, hedonic damages compensate the injured plaintiff for any loss of his enjoyment of life resulting from a tortfeasor's wrongful acts.[4] Typically, hedonic damage claims are brought pursuant to state survival or wrongful death statutes, or as an element of damages in personal injury actions.[5]

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[*] Selected as Best Comment Award for 1995-96. Award presented by Alston, Rutherford, Tardy and Van Slyke Law Firm, Jackson, Mississippi.

[**] The law is most praiseworthy when it is consistent with reason.

[1] *See* Gretchen L. Valentine, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 543, 544-46 (1990) (noting controversy existing among courts and among legal scholars as to availability of hedonic damages in tort cases); Lawrence G. Cetrulo & Suzanne Sheldon, *How to Defend Against Claims for Hedonic Damages*, 61 DEF. COUNS. J., Oct. 1994, at 585, 585 (discussing increased interest in hedonic damages by practicing attorneys). The "defense bar" has been increasingly vocal against hedonic damage awards due to the fear that such awards could substantially and unjustifiably increase jury verdicts. *Id.* at 586.

[2] Hedonic is taken from the Greek word *hedonikos* which means pleasure. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 837 (3d ed. 1992). BLACK'S LAW DICTIONARY 391 (6th ed. 1990) defines hedonic damages, in

Circumstances in which hedonic damages are compensable have sharply divided U.S. courts.[6] The controversy centers primarily on the question of whether hedonic damages, are a separate component of damages or whether they are an unseverable part of another classification of damages such as pain and suffering.[7] Proponents of hedonic damage awards contend that the loss of life's pleasures is a sepa-

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the legal sense, as those damages that compensate a victim "for the value of life itself." *See also* JOHN A. TARANTINO & PATRICIA K. ROCHA, ESTIMATING AND PROVING PERSONAL INJURY DAMAGES § 334 (1988) (discussing origin of term).

[3] Cetrulo & Sheldon, *supra* note 1, at 585. American judicial opinions citing claims by plaintiffs for the loss of enjoyment of life date back to the late 1800's. *See generally* L. A. Bradshaw, Annotation, *Comment Note.-Loss of Enjoyment of Life As an Element of, or Factor in Determining Damages for Bodily Injury*, 15 A.L.R.3d 506 (1967) (citing early rulings by U.S. courts on subject of hedonic damages).

[4] Tarantino-Rocha, *supra* note 2, § 334. General damages, as opposed to special damages, are subjective, difficult to quantify, and do not require proof in the form of an actual monetary figure. RESTATEMENT (SECOND) OF TORTS § 904(1) (1979). Included in general damages are the damages categories of pain and suffering, permanent or partial disability, loss of functional capacity, disfigurement, and hedonic damages. 22 AM. JUR. 2D *Damages* § 37 (1988); *see also* Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 285 (La. Ct. App. 1992) (categorizing hedonic damages as form of general damages).

[5] Valentine, *supra* note 2, at 555; *see also* Eric J. Guerin, Comment, *Pandora's Damages and the Undoing of Tort Reform: An Argument Against the Recovery of Hedonic Damages Under Michigan's Wrongful Death Act*, 1992 DET. C.L. REV. 77, 86-87 (1992) (tracing developing of hedonic damages cases in American jurisprudence).

[6] 24 AM. JUR. PROOF OF FACTS *Recovery of Damages for Loss of Enjoyment of Life* 171, 172 (1970). Claims for hedonic damages usually arise from claims for permanent physical injury or for pain and suffering. *Id.*

[7] *Id.*; *see generally* Pamela J. Hermes, *Loss of Enjoyment of Life-Duplication of Damages Versus Full Compensation*, 63 N.D. L. REV. 561 (1987) (comparing treatment of hedonic damages issue in various jurisdictions). For an excellent case discussing alternative theories and rulings in hedonic damages cases nationwide, see Ayers v. Robinson, 887 F. Supp. 1049 (N.D. Ill. 1995).

rate and distinct element of damages.[8] In their opinion, jury consideration of hedonic damages defeats the goal of tort law to restore wholeness to wrongly injured individuals.[9] In contrast, those opposed to hedonic damages argue that juries do evaluate adverse changes in the litigant's life and factor those changes into the total pain and suffering calculation.[10] They further claim that the speculative nature of such damages, and the inability of expert witnesses to quantify them, will mislead the jury and result in overcompensation.[11]

This comment will summarize the treatment of hedonic damage issues among various state and federal jurisdictions. It will also discuss the problem of admissibility and reliability of expert testimony on the lost pleasure of living in those jurisdictions allowing hedonic damage awards. While most states have resolved these issues, they remain technically unanswered in Mississippi. Presently, Mississippi case law neither adequately defines the exact circumstances under which a jury may award damages for lost value of life, nor does it address the extent to which expert testimony may be offered on the subject. Accordingly, this comment will offer a solution to clarify this state's position on hedonic damages.

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[8] Carleton Cramer, *Loss of Enjoyment of Life As a Separate Element of Damages*, 12 PAC. L.J. 965, 965 (1981); Paul E. Marth, *Loss of Enjoyment of Life-Should It Be A Compensable Element of Personal Injury Damages?*, 11 WAKE FOREST L. REV. 459, 471-72 (1975); *see also* John Dwight Ingram, *Damages for Loss of Enjoyment of Life*, 24 J. MARSHALL L. REV. 423, 429-30 (1991) (advocating separation of hedonic damages from more traditional forms of damage awards). Supporters of hedonic damages claim that a differentiation can be made between pain and suffering and loss of the enjoyment of life. Guerin, *supra* note 5, at 87. The differentiation appears to lie in the fact that pain may be short lived unlike the lifetime loss of one's capacity to enjoy pre-injury pastimes and vocations. *Id.* at 87-88. Accordingly, proponents of hedonic damage awards advocate that to award for pain and suffering or disability without a separate award for the loss of enjoyment of life serves as an injustice to the injured plaintiff. Marth, *supra*.

[9] *See* Andrew Jay McClurg, *It's A Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 66-68 (1990) (noting tort law's purpose "to restore the tort victim as nearly as possible to the position he would have been in had the injury not occurred."). Because human life creates the foundation for personal injury awards any reduction in the quality of life should be compensated when factual proof conclusively establishes loss. Ronald J. Mishkin, *Loss of Enjoyment of Life As an Element of Damages*, 73 DICK. L. REV. 639, 645-46 (1968).

[10] *See* Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990) (adopting New York's position that juries will adequately compensate injured plaintiffs for loss of enjoyment of life through pain and suffering awards); McDougald v. Garber, 536 N.E.2d 372, 376-77 (N.Y. 1989); *but see* Recent Case, *Damages-Loss of Enjoyment of Life-New York Court of Appeals Denies Loss-of-Enjoyment Damages to Comatose Plaintiffs*-McDougald v. Garber, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989), 103 HARV. L. REV. 811, 813 (1990) (discussing impact of *McDougald v. Garber* decision and criticizing court's holding).

[11] Guerin, *supra* note 5, at 117; Cetrulo & Sheldon, *supra* note 1, at 592. One court noted that "difficulty of measuring damages for loss of enjoyment in terms of money should not of itself be a bar to the recovery . . . [but] purely speculative damages are not recoverable." McAlister v. Carl, 197 A.2d 140, 145 (Md. 1964).

II. JURISDICTIONAL ADJUDICATION OF THE RECOVERABILITY OF DAMAGES FOR LOSS OF THE PLEASURE OF LIVING

Claims for compensation for the loss of life's pleasures typically fall into one of three categories. The first category addresses the right of the decedent's personal representative to recover hedonic damages through state survival statutes for the period between the injury and resulting death.[12] A second group of cases inquires into the availability of hedonic damages as a remedy for the decedent's heirs pursuant to state wrongful death statutes.[13] Personal injury actions form the final classification of hedonic damages cases and can be further divided into three subgroups: (1) jurisdictions that deny any recovery for loss of enjoyment of life;[14] (2) jurisdictions that allow hedonic damage awards, but only as a part of pain and suffering or permanent impairment;[15] and (3) jurisdictions that consider loss of enjoyment of life as a separately identifiable element of damages.[16] The following section examines the variations in legal authority and the corresponding analyses used by different courts to adjudicate the question of hedonic damages.

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[12] *See* McClurg, *supra* note 9, at 91-92. However, since survival statutes only allow the representative to recover damages the decedent would have been entitled to "had he lived," hedonic damages are inconsistent with the statutes' literal language. *Id.* at 91; *see* Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1191 (Pa. 1978) (stating that loss of life's pleasures "comparable only for a living plaintiff who has suffered from that loss").

[13] *See* Cetrulo & Sheldon, *supra* note 1, at 588.

[14] *See, e.g.*, McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989) (denying hedonic damages in personal injury action where plaintiff was unconscious and therefore unaware of any loss of enjoyment of life).

[15] *See* Elliot v. U.S., 877 F. Supp. 1569, 1578-79 (M.D. Ga. 1992) (awarding $1,000,000 in pain and suffering which included loss of enjoyment of life as result

A. *Survival Statutes*

In order to abrogate the common law rule that a person's cause of action for personal injury died with him, each state has enacted survival statutes.[17] These statutes provide that the decedent's personal representative may enforce the decedent's rights in a personal injury action against the tortfeasor.[18] As a prerequisite to the estate's recovery, the

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of landlord's negligent upkeep of apartment which led to carbon monoxide poisoning of plaintiff); Ortega v. Plexco, 793 F. Supp. 298, 300 (D.N.M. 1991) (allowing hedonic damages as component of pain and suffering); Fetzer v. Wood, 569 N.E.2d 1237, 1244 (Ill. App. Ct. 1991) (stating that "the concept of loss of the enjoyment of life is a relevant consideration in determining damages for pain and suffering . . . ."); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) (negating any separation of hedonic damages from pain and suffering); Nussbaum v. Gibstein, 536 N.E.2d 618, 619 (N.Y. 1989) (confirming New York's rule that hedonic damages cannot be severed from pain and suffering in personal injury cases); Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990) (finding juries capable of determining lost pleasures of plaintiff's life when rendering verdicts for pain and suffering, and thereby denying separate awards).

[16] Eyoma v. Falco, 589 A.2d 653, 558, (N.J. Super. Ct. App. Div. 1991) (stating that loss of enjoyment of life is separate and distinct element of damages, and fact that victim is comatose should not prevent award for damages resulting from tortious injury)

[17] W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS § 126, at 942 (5th ed. 1984). The common law rule prohibited a cause of action for personal injury if the would-be plaintiff died. HENRY F. BUSWELL, THE CIVIL LIABILITY FOR PERSONAL INJURIES ARISING OUT OF NEGLIGENCE § 17 (1893). Because the rule was thought to render an unjust result in cases that did not involve instantaneous death, state legislatures enacted survival statutes. 3 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS § 20.11 (1995).

[18] 4 MINZER ET AL., *supra* note 17, § 28.51[2][b]. Survival statutes may prevent the accrual of a cause of action if circumstances, such as the following, were present or were not present at the time of the decedent's death:

> (1) whether the personal injury action was pending at the time of the death of the injured party or the defendant;
> (2) whether the decedent was survived by a wife, child or other dependent;

personal representative must show that the decedent lived for a period of time between the injury and the moment of death.[19] Most damages suffered by the decedent during the interval are compensable once the defendant's negligence is proven.[20] For instance, the majority of survival statutes provide for damage awards "for the decedent's conscious pain and suffering prior to death, loss of past earnings, medical and hospital expenses, and punitive damages."[21] Whether the estate is entitled to pursue hedonic damages on the decedent's behalf in addition to the aforementioned categories of damages creates an entirely separate issue.[22]

Many jurisdictions have construed survival statutes to exclude recovery of hedonic damages.[23] Those courts have concluded that the fundamental purpose of a survival statute and the type of compensation sought through hedonic damages are not always compatible.[24] The primary goal of the sur-

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> (3) whether death was instantaneous;
> (4) whether the injured party died as a result of the injuries sued upon (fatal injuries) or from some unrelated cause (nonfatal injuries); or (5) whether the statute specifically excludes the type of action brought . . . .

Id.

[19] BUSWELL, *supra* note 17, § 18. Most jurisdictions hold that the decedent must be conscious following the injury in order for the personal representative to seek damages for pain and suffering. 4 MINZER ET AL., *supra* note 17, § 21.02[1] nn.2 & 3 and accompanying text. However, the other categories of compensable damages do not require proof of consciousness following injury. BUSWELL, *supra* note 17, § 19.

[20] Sterner v. Wesley College, Inc., 747 F. Supp. 263, 273 (D. Del. 1990). The *Sterner* court had held that the plaintiffs could not recover separately for hedonic damages under Delaware's survival statute. *Sterner*, 747 F. Supp. at 273.

[21] 3 MINZER ET AL., *supra* note 17, § 21.01. As the cause of action is purely statutory, the personal representative may only pursue the case "to the extent and in the manner provided for by [the] statute." *Id.* § 20.11[1].

[22] *See* 3 MINZER ET AL., *supra* note 17, § 21.06 nn.1 & 2.

[23] Simmons v. Hartford Ins. Co., 786 F. Supp. 574, 580 (E.D. La. 1992) (stating that "loss of chance of survival is not recoverable as an element of damage under the survival action in Louisiana."); *Sterner*, 747 F. Supp. at 272-73 (noting that hedonic damages may only be relevant as component for measuring pain and suffering).

[24] *See Simmons*, 786 F. Supp. at 579-80 (discussing lack of relationship between hedonic damages and survival statute). Survival statutes only allow for damages to which the decedent would have been entitled had he lived, and the

vival statute is to allow a person's personal claim against the tortfeasor to survive his death.[25] In contrast, hedonic damages awards compensate the injured person for his lost pleasures *while living.*[26]

To illustrate the conflict between the hedonic damages concept and survival actions, consider the person who dies almost immediately following his injury. It is difficult to contend that he experienced any measurable loss of enjoyment of life.[27] On the other hand, if the injured person lives for a short time and consciously realizes a dramatic change in his physical capabilities, a survival statute would compensate the decedent's estate for any diminished pleasure of living during that period.[28] Based on this analysis, some jurisdictions have allowed recovery under circumstances such as set forth in the second example, but have typically included those damages as a component of another damages category such as pain and suffering.[29]

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decedent would have claimed for the lost value of life, if he had lived. McClurg, *supra* note 9, at 91-92.

[25] *See supra* note 18.

[26] Chausse v. Southland Corp., 400 So. 2d 1199, 1203-04 (La. Ct. App. 1981). A deceased may only recover for pain and suffering, unless he was conscious following the injury. *Chausse*, 400 So. 2d at 1203 (citing McDaniel v. Welsh, 234 So. 2d 833, 841 (La. Ct. App. 1970)).

[27] *Sterner*, 747 F. Supp. at 272-73. In *Sterner*, the court held that the Delaware survival statute precluded hedonic damage awards where a decedent's death occurred almost simultaneously with injury. *Id.*; *see* Chausse v. Southland Corp., 400 So. 2d 1199, 1203-04 (La. Ct. App. 1981) (denying hedonic damages as well as pain and suffering damages without proof of decedent's awareness of injuries prior to death).

[28] *Sterner*, 747 F. Supp. at 270. The Pennsylvania Supreme Court concluded that hedonic damages were appropriate if the individual survived the injury and was cognizant of the injury's lasting effect on his existence. Willinger v. Mercy Catholic Med. Ctr, 393 A.2d 1188, 1191 (Pa. 1978). *But see* Eyoma v. Falco, 589 A.2d 653, 658, 661-62 (N.J. Super. Ct. App. Div. 1991) (holding that comatose victims can recover for loss of enjoyment of life under survival statute as component of permanent disability).

[29] *Sterner*, 747 F. Supp. at 273. The *Sterner* court held that the plaintiffs might offer evidence of the hedonic value of the decedent's life solely to the extent that it was relevant to measuring the decedent's pain and suffering during the period between the start of the fire and the decedent's death. *Id. But see Eyoma*, 589 A.2d at 662 (allowing unconscious victim's estate to recover hedonic

B. Wrongful Death Statutes

While it is virtually unanimous among jurisdictions that hedonic damages are not compensable under state wrongful death statutes, the reasons for rejecting recovery varies.[30] For instance, some courts have denied hedonic damages where statutory language specifically enumerated the types of damages available in wrongful death actions.[31] Those courts concluded that their state legislatures would have inserted hedonic damages as a specific type of remedy in the statute if it had intended for plaintiffs to be compensated for loss of enjoyment of life.[32] In states where the wrongful death statutes

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damages as part of permanent impairment rather than as component of pain and suffering).

[30] Simmons v. Hartford Ins. Co., 786 F. Supp. 574, 580-81 (E.D. La. 1992). In *Simmons*, the district court examined Louisiana jurisprudence and noted that the prevailing view was that wrongful death statutes were intended "to compensate the survivors for their losses, not for the decedent's losses." Id., at 581 *see also* Pitman v. Thorndike, 762 F. Supp. 870, 872-73 (D. Nev. 1991) (denying hedonic damages under wrongful death statute when decedent was not cognizant of pain and suffering); Livingston v. United States, 817 F. Supp. 601, 605-06 (E.D.N.C. 1993) (refusing to allow hedonic damages because North Carolina wrongful death statute did not give authority to do so and because compensation under statute was intended to "restore the beneficiaries to the same position they would have occupied. . . ."); Bailey v. Rose Care Center, 817 S.W.2d 412, 415 (Ark. 1991) (denying hedonic damages because Arkansas law does not recognize them); Dowling v. Lopez, 440 S.E.2d 205, 207-08 (Ga. Ct. App. 1993) (noting that language of Georgia's wrongful death statute does not provide for hedonic damages and must be interpreted strictly); Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677, 680 (Ind. Ct. App. 1991) (denying hedonic damages because Indiana's wrongful death statute does not allow them). Connecticut is in the minority in that it allows survivors to recover hedonic damages under its wrongful death statutes. Katsetos v. Nolan, 368 A.2d 172, 183 (Conn. 1976); *see also* Romero v. Byers, 872 P.2d 840, 845-47 (N.M. 1994) (allowing recovery of hedonic damages under New Mexico wrongful death statute).

[31] *Livingston*, 817 F. Supp. at 606. The North Carolina wrongful death statute enumerates the available damages, including medical costs, pain and suffering, funeral expenses, and economic loss, but it does not provide for hedonic damages. *Id.* at 604.

[32] Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 943-44 (Tenn. 1994). The Tennessee Supreme Court noted that Tennessee's wrongful death statute only provides recovery for "mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries and also the damages resulting to the parties for whose use and benefit the right of action survives

were broadly phrased and failed to enumerate compensable damages, courts have sought guidance from prior judicial decisions that adjudicated the types of remedies available under the statute.[33] If prior case law specified the types of damages available under the statute, but failed to comment on or include loss of enjoyment of life, courts have typically followed precedent and denied hedonic damages as contrary to statutory intent.[34]

Finally, courts have rejected hedonic damage awards under state wrongful death statutes on the grounds that other types of damage awards adequately compensate survivors of the victim.[35] For example, most wrongful death plaintiffs who seek compensation for mental anguish after seeing their loved one's diminished capacity to enjoy life prior to death have met with little success.[36] Courts that have considered the issue generally conclude that such damages are too speculative and are not true hedonic damages.[37] Those courts have further

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from the death consequent upon the injuries received." *Id.* at 943.

[33] Nichols v. Estabrook, 741 F. Supp. 325, 328-29 (D.N.H. 1989). The district court in Nichols observed that although the New Hampshire wrongful death statute provided for "elements of damages in connection with other elements allowed by law," as if the decedent had survived, the New Hampshire Supreme Court had held that hedonic damages were not allowed under the statute. *Id.*

[34] *Spencer*, 880 S.W.2d at 943-44. The Spencer court observed that courts typically denied hedonic damages because they did not serve the "compensatory function of tort law" and also because "valuing the pleasures of life is too speculative to form a basis for computing damages." *Id.* at 943; *see Nichols*, 741 F. Supp. at 328-29 (noting that New Hampshire Supreme Court had interpreted New Hampshire wrongful death statute not to include hedonic damages). *But see Romero*, 872 P.2d at 845-47 (interpreting broadly statutory language in Wrongful Death Act to include hedonic damages).

[35] Sterner v. Wesley College, Inc., 747 F. Supp. 263, 274-75 (D. Del. 1990). One court concluded that hedonic damage awards provided survivors with a double recovery which is in contravention of its wrongful death statute. *Livingston*, 817 F. Supp. at 606 .

[36] *Sterner*, 747 F. Supp. at 273-74. In *Sterner*, the court denied the decedent's parents' claim of hedonic damages as part of their recovery for mental anguish, under Delaware's wrongful death statute. *Id.*

[37] *Id.* at 274. The *Sterner* court found that the "hedonic value" of the decedent's life "in regard to the mental anguish suffered" by his parents "is so attenuated as to be impermissibly speculative." *Id.*; *see* Sullivan v. United States Gypsum Co., 862 F. Supp. 317, 320-21 (D. Kan. 1994) (precluding testimony of

stated that the survivor's personal grief, under such circumstances, is more properly compensated as a part of pain and suffering, rather than loss of enjoyment of life.[38] Hence, recovery of hedonic damages by a decedent's survivors under a state's wrongful death statute is unlikely in many jurisdictions.[39]

C. *Loss of Enjoyment of Life as a Separate Element of Damages in Personal Injury Actions*

While most states recognize hedonic damages in personal injury actions, they are sharply divided on the issue of whether loss of enjoyment of life should be a component of general damages or a completely separate element of damages.[40] Jurisdictions that permit a separate award for hedonic damages rationalize the decision by basing it on the tort system's objective of restoring the plaintiff to his pre-injury status.[41] Ac-

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economist regarding hedonic damages because such evidence is not considered scientifically valid); Ham v. Maine-New Hampshire Interstate Bridge Auth., 30 A.2d 1, 6 (N.H. 1943) (refusing to enter "boundless field of arbitrary assessment" of hedonic damages).

[38] *Sterner*, 747 F. Supp. at 274. The court noted that evidence of the hedonic value of the decedent's life, presented by the plaintiff's expert, could only be presented as a distinct basis for recovery, not as a "measure of the parents' mental anguish," but the court found no authority to support hedonic damages as a distinct form of recovery under Delaware's wrongful death statute. *Id.*; *see also Livingston*, 817 F. Supp. at 606 (holding that hedonic damage awards to decedents' beneficiaries under state wrongful death statute would result in overcompensation as beneficiaries were adequately compensated under other types of damage awards).

[39] *See supra* note 30 and accompanying text.

[40] Mariner v. Marsden, 610 P.2d 6, 17 (Wyo. 1980) (Rooney, J., dissenting); *see* Ingram, *supra* note 8, at 424-25 (discussing varying rules among American courts on issue); Kyle R. Crowe, Note, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA LAW. REV. 1275, 1277-1301 (1990) (discussing treatment of hedonic damages as separate remedy).

[41] Thompson v. National R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980). In *Thompson*, the court stated that the purpose of compensatory damages is to make the person whole by awarding money damages as an equivalent "for each loss suffered." *Thompson*, 621 F.2d at 824; *see* Kirk v. Washington State Univ., 746 P.2d 285, 293 (Wash. 1987) (upholding trial court's instruction to jury which allowed jury to consider separately plaintiff's "inability to pursue her inter-

cording to those courts, hedonic damages are a distinct and divisible loss experienced by the victim that should be compensated separately from other types of damages.[42] Under their rationale, a victim may not receive full compensation unless a jury separately considered loss of enjoyment of life.[43] Courts further justify a separate damage award by reasoning that hedonic damages may have a different monetary value from other categories of damages such as pain and suffering or permanent disability.[44]

A narrow group of cases, while allowing compensation for hedonic damages, recognize that the facts of the case may render it inappropriate for a jury's consideration of a separately calculated hedonic damages award.[45] For instance, if the court finds that the connection between the plaintiff's injury

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ests and abilities in ballet."). *But see Mariner*, 610 P.2d at 12 (giving plaintiff option to pursue hedonic damages as part of "general damages" or as "separate award").

[42] *Thompson*, 621 F.2d at 824-25; *see also Kirk*, 746 P.2d at 292-93 (noting that awards for pain and suffering or permanent disability may not take plaintiffs' loss of enjoyment of former pursuits into account); Lebesco v. Southeastern Penn. Trans. Auth., 380 A.2d 848, 852 (Pa. Super. Ct. 1977) (awarding hedonic damages in order to fully compensate plaintiff for losses resulting from defendant's negligence).

[43] *Thompson*, 621 F.2d at 824-25.

[44] *Id.* at 824.

[45] *Id.* The Sixth Circuit noted that the district court judge awarded a different amount for hedonic damages than he did for permanent disability. *Id.* at 824-25. Had the award not been broken into separate components, the Sixth Circuit surmised that one of the other elements would have been increased by that amount. *Id.* By breaking the award down into each element of damages, the plaintiff is more clearly and appropriately compensated for all of his losses. *Id. see, e.g.,* Dyer v. United States, 551 F. Supp. 1266, 1281 (W.D. Mich. 1982) (calculating separate hedonic damages award to compensate plaintiff for injury resulting in "numbness around mouth" which "affect[ed] his ability to enjoy the food he eats, his physical appearance, and his sensory perception. . . .") McAlister v. Carl, 197 A.2d 140, 146 (Md. 1964). In *McAllister*, the court held that testimony proving the plaintiff's loss of enjoyment due to the inability to perform occupation was too speculative to submit to the jury even though Maryland recognized hedonic damages. *McAlister*, 197 A.2d at 146; *see also* Mariner v. Marsden, 610 P.2d 6, 12 (Wyo. 1980) (citing Swiler v. Baker's Super Mkt., Inc., 277 N.W.2d 697 (Neb. 1979)) (finding no error where jury was instructed on loss of enjoyment, when jury could find from evidence that injuries and disability did cause loss of enjoyment of life).

and his claim of diminished capacity to enjoy life is improbable, it would not instruct the jury on hedonic damages. Thus, in those jurisdictions, hedonic damages are a distinct component of damages to be rejected or awarded by the jury, but only after the trial judge determines that the facts support the jury's deliberation on the issue.[46]

D. Loss of Enjoyment of Life as a Part of Other Categories of General Damages

A significant number of jurisdictions recognize the compensability of hedonic damages, but reject any contention that the loss of life's pleasures is a separate category of damages.[47] Those jurisdictions generally consolidate hedonic damages into another classification of damages in order to avoid misdirecting the jury or duplicating damages.[48] While those courts typically allow the jury to hear testimony about the plaintiff's diminished quality of life, they will not permit the jury to receive a separate instruction on hedonic damages.[49] Instead, those courts will instruct the jury to consider the plaintiff's claim of diminished capacity to enjoy life when calculating and awarding damages for pain and suffering[50] or permanent disability.[51]

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[46] *McAlister*, 197 A.2d at 146. The court in *McAlister* found that "damages might have been attributable to the plaintiff's inability to become an instructor in physical education" were too speculative to be submitted to the jury. *Id.*; *see also* Swiler v. Baker's Super Mkt., Inc., 277 N.W.2d 697, 700 (Neb. 1979) (finding jury instruction on hedonic damages to be supported by evidence of "plaintiff's diminished capacity to enjoy life with respect to activities formerly enjoyed, deprivations of pleasure, and inconvenience").

[47] Cetrulo, *supra* note 1, at 586--87. Courts refusing to consider loss of enjoyment of life as a separate element of damages usually base their decisions on the rationale that to hold otherwise would result in duplicate or overlapping damages. *Id.* at 586. Elliot v. United States, 877 F. Supp. 1569, 1579 (M.D. Ga. 1992) (awarding $1,000,000 for "loss of enjoyment of life as an element of pain and suffering . . . ."); Fetzer v. Wood, 569 N.E.2d 1237, 1244 (Ill. App. Ct. 1991) ("concept of loss of the enjoyment of life is a relevant consideration in determining damages for pain and suffering . . . ."); Gregory v. Carey, 791 P.2d 1329, 1336 (Kan. 1990) (allowing jury to consider hedonic damages as part of pain and suffering as well as permanent disability); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985) ("We recognize loss of enjoyment of life as a factor to be considered as a part of future pain and suffering."); Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991) (holding that unconscious person may recover hedonic damages through permanent impairment remedy, but not as part of pain and suffering); Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990) (combining loss of enjoyment of life with pain and suffering award); *see also* Hermes, *supra* note 7 at 569 (providing overview of various decisions that combine loss of enjoyment of life with pain and suffering).

[48] Dugas v. Kansas City S. Ry. Lines, 473 F.2d 821, 827-28 (5th Cir. 1973). In *Dugas*, the Fifth Circuit found the jury instructions, which repeatedly refereed

One of the leading cases for the proposition that hedonic damages are not separately compensable is *McDougald v. Garber*.[52] In that case, the jury awarded the plaintiff

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to "loss of enjoyment of life and loss of vitality" as separate elements of damages, to be confusing regarding the correct standards to apply. *Dugas*, 473 F.2d at 828; *see also*, Canfield v. Sandock, 563 N.E.2d 1279, 1281-82 (Ind. 1990) (finding jury instructions, "which define loss of 'quality and enjoyment of life' as a separate element of damages," to provide too little jury constraint and subject to double damages); Huff v. Tracy, 129 Cal. Rptr. 551, 553 (Cal. Ct. App. 1976) (finding separate "enjoyment-of-life instruction" was repetitive of pain and suffering instruction and increased chances of double compensation).

[49] Leiker v. Gafford, 778 P.2d 823, 835 (Kan. 1989). The *Leiker* court held that courts should not give separate instructions on lost enjoyment of life, due to the potential for duplicate or overlapping damages. *Leiker*, 778 P.2d at 835; *see Swiler*, 277 N.W.2d at 700 (stating that separate instruction may unnecessarily confuse jury in some cases); *see also* Hermes, *supra* note 7, at 569 (discussing decisions wherein courts allowed testimony on hedonic damages but instructed jury to consider plaintiff's loss of enjoyment of life as part of pain and suffering).

[50] Brant v. Bockholt, 532 N.W.2d 801, 804 (Iowa 1995). The court in *Brant*, approved of the trial court's broad definition of pain and suffering, which included loss of enjoyment of life, as well as "bodily suffering, sensation or discomfort, mental pain, including mental anguish, anxiety, embarrassment . . . a feeling of uselessness, or other emotional distress." *Brant*, 532 N.W.2d at 804; *see also* McDougald v. Garber, 536 N.E.2d 372, 376-77 (N.Y. 1989) (noting that "suffering . . . can easily encompass the frustration and anguish caused by the inability to participate in activities that once brought pleasure); Wagner v. York Hosp., 608 A.2d 496, 502 (Pa. Super. Ct. 1992) (approving of injury instructions which did not indicate to jury that loss of life's pleasures was separate element of damages).

[51] Knight v. Lord, 648 N.E.2d 617, 623 (Ill. App. Ct. 1995). The *Knight* court noted several Illinois decisions which held loss of enjoyment of life to be a component of disability damages. *Knight*, 648 N.E.2d at 623; *see* Eyoma v. Falco, 589 A.2d 653, 662 (N.J. Super. Ct. App. Div. 1991) (stating that loss of enjoyment of life was not function of pain and suffering but was element of permanent injury); Winter v. Pennsylvania R. Co., 68 A.2d 513, 515 (Pa. 1949) (holding that in evaluating degree of disability, jury may consider all "activities—business, pleasure, or otherwise—which the impairment impedes or prevents").

[52] 536 N.E.2d 372 (N.Y. 1989).

$3,500,000 in hedonic damages after determining that the doctors' negligence caused her permanent comatose condition.[53]

On appeal, the defendants argued that the trial court erred in allowing the jury to consider and award hedonic damages to an unconscious plaintiff.[54] The defendants contended that it is impossible for an unconscious person to perceive that a tortfeasor's negligence drastically altered his or her lifestyle.[55] Therefore, the defendant's argued, any award for lost enjoyment of life would be meaningless.[56]

The court reasoned that an award of hedonic damages to an unconscious plaintiff failed to meet the tort system's goal of compensating an injured plaintiff.[57] Since the plaintiff's condition prevented awareness of the award, she would be unable to use the money to make her life more enjoyable.[58] Thus, the court held that "cognitive awareness" was "a prerequisite to recovery for loss of enjoyment of life."[59]

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[53] *McDougald*, 536 N.E.2d at 373. The jury concluded that the defendants' negligence prevented the plaintiff from receiving sufficient oxygen during a surgical procedure which produced the plaintiff's physical situation. *Id.*

[54] *Id.* The plaintiffs asserted "that loss of enjoyment of life was compensable without regard to whether the plaintiff was aware of the loss." *Id.* at 374. The trial court ultimately adopted the plaintiffs' position. *Id.*

[55] *Id.* The trial court, after rejecting the defendants argument, "charged" the jury with the following instruction:

> 'Damages for the loss of the pleasures and pursuits of life, however, require no awareness of the loss on the part of the injured person. . . . Damages for this item of injury relate not to what Emma McDougald is aware of, but rather to what she has lost. What her life was prior to her injury and what it has been since September 6, 1978 and what it will be for as long as she lives.'

Id.

[56] *Id.* at 374-75. The court held that such an award could not furnish the victim "any consolation or ease any burden resting on him." *Id.* at 375.

[57] *Id.* at 375. The court concluded that hedonic damage awards in cases involving unconscious victims would have a punitive affect on the defendant which is contrary to tort law. *Id.*

[58] *McDougald*, 536 N.E.2d at 375; *see also* Flannery v. United States, 718 F.2d 108, 111 (4th Cir. 1983) (leading case holding that under FTCA, comatose victims cannot be compensated through hedonic damages because they are unable to use money to restore any pleasure to their lives), *cert. denied*, 476 U.S. 1226 (1984). *But see* Flannery v. United States, 297 S.E.2d 433, 438 (W. Va. 1982) (certifying that West Virginia recognizes hedonic damage awards as component of permanent impairment for semicomatose plaintiffs).

The *McDougald* court then discussed whether loss of enjoyment of life should be separately evaluated and measured by the jury.[60] In analyzing decisions rendered in other jurisdictions, the court found persuasive those cases that combined hedonic damages with pain and suffering.[61] Due to the overlapping between the two types of damages, the court reasoned that a separate charge to the jury would only confuse the issue and potentially result in excessive or exaggerated damage awards.[62] By allowing the jury to consider the plaintiff's loss of the pleasure of living when calculating pain and suffering, the jury would be more likely to accurately assess the plaintiff's total nonpecuniary damages.[63]

III. EXPERT TESTIMONY AND HEDONIC DAMAGES

While most jurisdictions recognize hedonic damages as a legitimate part of a personal injury action, lawyers intensely debate whether expert testimony is admissible to prove those damages.[64] The plaintiffs' bar contends that expert testimony explains to jurors the permanently altered aspects of a person's life that formulate hedonic damages, which helps jurors to quantify the plaintiff's loss in terms of dollars.[65] In contrast, the defense attorneys' bar claims that no one is an expert on the value another places on his own life.[66] Furthermore, any testimony to that effect would only serve to confuse the jury, since it is not grounded in scientifically accepted data.[67]

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[59] *McDougald*, 536 N.E.2d at 375; *see also* Pittman v. Thorndike, 762 F. Supp. 870, 872 (D. Nev. 1991) (holding that pain and suffering must be "consciously experienced" before hedonic damages are awarded); 2 STUART M. SPEISER ET. AL., THE AMERICAN LAW OF TORTS § 8.20, at 572 (1985) (giving broad overview of American courts' treatment of hedonic damages in cases involving unconscious plaintiffs).

[60] *McDougald*, 536 N.E.2d at 376.

[61] *Id.* at 376-77; *see also* Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990) (holding that jury instruction should include hedonic damages within pain and suffering category of damages).

[62] *McDougald*, 536 N.E.2d at 376-77. The court stated that it was difficult to put an exact dollar amount on any of the categories of general damages. *Id.* By separating hedonic damages from pain and suffering, the court surmised that the process would be further complicated. *Id.* at 376-77; *see also Bulala*, 389 S.E.2d at 677 (following *McDougald* and including hedonic damages in "suffering" component of pain and suffering).

[63] *McDougald*, 536 N.E.2d 372, 375-76 (N.Y. Ct. App. 1989). The court concluded that "the term 'suffering'", in pain and suffering damages, could easily encompass victim's lost pleasures in existing). *Id.* at 376-77.

[64] Larry Bodine, *Hedonic Damages Catch On; Tort Awards*, THE NAT'L L. J., Mar. 9, 1992, at 27.

Decisions as to the admissibility of expert testimony[68] in hedonic damages actions has widely varied.[69] In fact, some courts within the same jurisdiction allowed the testimony in one case only to exclude it in the next.[70] Thus, the lack of reliable authority on the disputed matter has left attorneys uncertain as to how they can best prove or disprove claims of hedonic damages in the courtroom.

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[65] Estate of Sinthasomphone v. City of Milwaukee, 878 F. Supp. 147, 152 (E.D. Wis. 1995); *see also* Stephen T. Riley, *The Economics of Hedonic Damages*, NEV. LAW., Sept. 1993, at 24.

[66] *Estate of Sinthasomphone*, 878 F. Supp. at 152.

[67] Ayers v. Robinson, 887 F. Supp. 1049, 1064 (N.D. Ill. 1995); Buckhalter v. Burlington N. R.R., No. EC 90-139-D-D, 1992 WL 236676, at *4 (N.D. Miss. Mar. 23, 1992); Hein v. Merck & Co., 868 F. Supp. 230, 232 (M.D. Tenn. 1994); *see also* Moore v. Kroger Co., 800 F. Supp. 429, 436 (N.D. Miss. 1992) (delaying its decision whether to allow expert testimony on hedonic damages until plaintiff showed that testimony was relevant, helpful to jury, and non-prejudicial), *aff'd*, 18 F.3d 936 (5th Cir. 1994).

[68] Typically, forensic economists are used as experts on the value a person places on his life. *See* MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC/HEDONIC DAMAGES § 9.1 (1990) (discussing forensic economist's role at trial). Stan Smith, a forensic economist, claims to have "provided the first testimony on hedonic damages in U.S. courts" in 1984. Stan V. Smith, *Hedonic Damages in the Courtroom Setting-A Bridge Over Troubled Waters*, 3 J. FORENSIC ECONOMICS 41, 42 (Fall 1990). Testimony on the subject usually centers upon "willingness to pay studies." Sisken et al., LITIGATING EMPLOYMENT DISCRIMINATION CASES SEMINAR 1995, at 187, _____ (PLI Litig. & Admin. Practice Course Handbook Series N. 522, 1995); *see generally* Ted R. Miller, *Willingness to Pay Comes of Age: Will the System Survive?*, 83 N. WEST U.L. REV. 876 (1989) (discussing willingness to pay methodology and use of those studies in courtroom situations). These willingness to pay studies calculate the amount of money a person will pay for seat belts, vaccines, life insurance, etc., in an effort to determine the value that the person places on his life. *See* BRENT B. DANNINGER, HEDONIC DAMAGES: PROVING DAMAGES FOR LOST ENJOYMENT OF LIVING § 2.1 (Supp. 1993) (illustrating monetary values for person's life based on "life expectancy"); Smith, *Courtroom Setting*, *supra* § 9.3 (discussing procedures used by forensic economists in determining lost value of life damages); W. Kip Viscusi, *The Value of Life: Has Voodoo Economics Come to the Courts?*, 3 J. FORENSIC ECONOMICS 1, 8-12 (1990); *see also* Ayers v. Robinson, 887 F. Supp. 1049, 1051-58 (N.D. Ill. 1995) (quoting "sample [expert] testimony" on "willingness-to-pay methodology" from Stan Smith's book, ECONOMIC/HEDONIC DAMAGES).

[69] *See* Cetrulo & Sheldon, *supra* note 1, at 599-92 (discussing controversy

In 1993, the United States Supreme Court rendered an opinion that directly affects the issue of admissibility of expert testimony in hedonic damages cases. The Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*[71] clarified the standards a trial judge should apply in determining whether someone qualifies as an expert witness under Rule 702[72] of the Federal Rules of Evidence.[73] The Supreme Court ultimately

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surrounding admissibility of expert testimony).

[70] *Compare* Mercado v. Ahmed, 756 F. Supp. 1097 (N.D. Ill. 1991) *with* Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *vacated and remanded on other grounds*, 835 F.2d 1222 (7th Cir. 1988). These cases illustrate the disparity between courts as two federal district judges in the same district in Illinois reached opposite conclusions as to the admissibility of expert testimony on the hedonic damages issue.

In *Sherrod*, the federal trial court, in the Northern District of Illinois, issued a Memorandum in response to the defendants' motion for "judgment notwithstanding the verdict, a remittitur, or a new trial." *Sherrod*, 629 F. Supp. at 160. The defendants claimed that "they were prejudiced by the testimony" of the plaintiff's expert, Stan Smith, on the subject of the decedent's loss of enjoyment of life. *Id.* The court determined that Smith's testimony was not speculative and upheld it as "enabl[ing] the jury to perform its function in determining the proper measure of damages in [the] case." *Id.* at 164.

By contrast, in *Mercado*, Justice Zagel, also of the Northern District of Illinois, refused to allow Stan Smith to testify as an expert on the measurement of hedonic damages. *Mercado*, 756 F. Supp. at 1103. Judge Zagel opined that before allowing any expert to testify, the "reliability and validity" of any proffered expert testimony had to be carefully considered on topics that had not been uniformly accepted in the scientific or legal community. *Id.* at 1101-02. Justice Zagel concluded that there was neither "unanimity" "among economists as to what elements ought to go into the life valuation", nor was there proof of reliability. *Id.* at 1103. As a result of his analysis, the court excluded Smith's testimony on the plaintiff's loss of enjoyment of life. *Id.*

[71] 113 S. Ct. 2786 (1993).

[72] Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

[73] Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2796 (1993). The

held that in order for a witness to be classified as an expert under Rule 702, the trial judge must determine that (1) the subject matter of the proffered testimony is grounded in "scientific knowledge"[74] and (2) the testimony "will assist the trier of fact to understand or determine a fact in issue."[75]

To assist the trial judge in determining what testimony is grounded in science under the first prong of the test, the Court set forth detailed criteria.[76] First, the trial judge should determine whether the proposed theory has been tested for accuracy and reliability.[77] According to the Court, testing is the factor that sets science apart from mere opinion or belief.[78] Next, the trial judge must inquire as to whether the theory "has been subjected to peer review and publication."[79] If the hypothesis has been submitted to scrutiny by one's peers, then it is more likely to be accurate and credible.[80] Third, the court must "consider the known or potential rate of error" surrounding the theory.[81] And finally, the weight of the witness's theory among experts in the field should be con-

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Court determined that the Federal Rules of Evidence abrogated the "general acceptance" test which had long been followed in federal courts. *Id.* at 2795. The general acceptance test, set forth in 1923, prohibited expert testimony unless the expert reached his opinion from a source that was scientifically accepted in the expert's profession. *Id.* at 2793 (quoting Frye v. United States, 293 F. 1013, 1014 (1923)).

[74] *Id.* at 2795.

> [I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."

Id.

[75] *Id.* at 2796. This prong of the test "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.*

[76] *See id.* at 2796-97. The Supreme Court stated that, under Rule 702, a federal trial court is responsible for ensuring that an expert's testimony is trustworthy. *Id.* at 2795.

[77] *Id.*

[78] *Daubert*, 113 S. Ct. at 2795.

[79] *Id.* at 2797.

[80] *Id.*

[81] *Id.*

sidered.[82] When applied together, these four steps give a federal trial judge clear guidance as to the admissibility of an expert's opinion testimony under Rule 702.

Since *Daubert*, federal decisions on the question of whether hedonic damage "experts" can testify have become more uniform in their holdings. Generally, federal courts have excluded expert witness testimony on hedonic damages after applying the *Daubert* standard.[83]

The 1995 case of *Ayers v. Robinson*,[84] provides a recent example of a case in which the *Daubert* factors were applied to determine the admissibility of expert testimony on loss of enjoyment of life.[85] In *Ayers*, the defendant made a motion to exclude plaintiff economist expert Stan Smith's testimony on hedonic damages on the grounds that *Daubert* precluded such testimony.[86] The court assumed that Smith would use the "'willingness-to-pay' approach"[87] to measure Ayers's lost enjoyment of life.[88] In determining whether he could testify, the court subjected each factor that Smith typically relied upon in reaching his final figure[89] to *Daubert*'s analysis.[90]

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[82] *Id.*

[83] *See, e.g.*, Ayers v. Robinson, 887 F. Supp. 1049, 1064 (N.D. Ill. 1995) (applying *Daubert* principles to export testimony of Stan Smith regarding hedonic damages); Sullivan v. United States Gypsum Co., 862 F. Supp. 317, 321 (D. Kan. 1994) (using *Daubert* principles to preclude testimony of plaintiff's expert witness); Hein v. Merck & Co., 868 F. Supp. 230, 235 (M.D. Tenn. 1994) (stating expert testimony regarding hedonic damages was "unreliable" and "invalid" in light of *Daubert*); *see also* Wilt v. Buracker, 443 S.E.2d 196, 200 (W. Va. 1993) (noting that since West Virginia's Rule 702 is identical to Federal Rule 702, *Daubert*'s analysis was material in determining whether hedonic damages "expert" could testify), *cert. denied*, 114 S. Ct. 2137 (1994); *see generally Evidence-Hedonic Damages-Daubert Testimony*, 10 FED. LITIGATOR 84 (May 1995) (discussing *Hein*).

[84] 887 F. Supp. 1049 (N.D. Ill. 1995)

[85] *Ayers*, 887 F. Supp. at 1051. The plaintiff alleged that a member of the Chicago police force caused Ayers' death. *Id.* at 1059.

[86] *Id.* at 1051. The plaintiff planned to have Stan Smith testify in order to prove the decedent's hedonic damages. *Id.*

[87] *See supra* note 70 and *infra* note 93.

[88] *Ayers*, 887 F. Supp. at 1051. The court noted that while the plaintiff had not advised the court of the exact content of Smith's testimony, it was reasonable to assume that he would testify consistently with his published articles which discussed the willingness-to-pay calculation. *Id.*

After reviewing the various methods employed by Smith, the *Ayers* court soundly rejected the argument that the techniques[91] used to evaluate the worth of a person's life were scientific.[92] According to the court, since economists start with a benchmark dollar figure and reduce or increase the value of a person's life in ranges, the end result would always vary depending on which economist made the valuation.[93] The seemingly endless possible variance in results makes this type of expert testimony imprecise and speculative.[94] The court also commented that the forensic economist's view that people choose how much risk they will have in their lives further invalidates the methods used by the economists in reaching an exact dollar figure.[95] Because the *Ayers* court was firmly convinced that the methods used to calculate hedonic damages were unreliable and unscientific, it excluded Stan Smith's testimony under federal Rules 702 and 403.[96]

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[89] *See infra* note 93.

[90] *Id.* at 1059-64.

[91] *Id.* at 1064. Economists primarily use three methods to place a monetary value on the pleasure of living. Those methods are "1)[w]age studies comparing wages and risks in different jobs, 2) [c]onsumer purchasing patterns for safety related items, and 3) [s]urveys asking people about their willingness to accept risk." Hein v. Merck & Co., 868 F. Supp. 230, 231 (M. D. Tenn. 1994). Expert witness Stan Smith adds a fourth component to the analysis: "studies of government regulations requiring expenditures for safety measures." Cetrulo & Sheldon, *supra* note 1, at 589; *see also* Thomas O. Depperschmidt, *Unintended Consequences and Perverse Effects in Forensic Economic Award Calculators*, J. LEGAL ECON., Summer 1994, at 65 (summarizing calculation of hedonic damages by forensic economists); Stephen T. Riley, *The Economics of Hedonic Damages*, NEV. LAW., Sept. 1993, at 24 (discussing variance among plaintiffs as to the measurement of life's value).

[92] *Ayers*, 887 F. Supp. at 1064. The court determined that Stan Smith's testimony on the value of life was inadmissible under both Rule 702 and Rule 403 of the Federal Rules of Evidence. *Id.*; *see* Crowe, *supra* note 40, at 1298-99 (arguing that hedonic damages testimony is excludable under Rule 403 of Iowa Rules of Evidence).

[93] *Ayers*, 887 F. Supp. at 1061. Typically, economists use a benchmark figure of between $2.5 million and $3.5 million as the value of a person's life. *Id.* The court concluded that economists reach this figure by "eyeballing" data reflective of the value a person places on his life. *Id.* at 1060. The court opined that such inexact methodology is repugnant to any scientific approach used calculate damages and therefore, is in contravention with to holding in *Daubert*. *Id.*

[94] *Id.* at 1061. The court concluded that Smith's testimony was also inadmissible under Rule 403 of the Federal Rules of Evidence. *Id.* at 1062. Rule 403 requires the court to weight the probative value of the expert's testimony against any "danger of unfair prejudice." *Id.* The court stated that the methods used by forensic experts in conforming the value of life to a particular plaintiff were unreliable and should not be presented to the jury. *Id.*

While federal courts appear to be excluding expert testimony on hedonic damages in light of *Daubert*,[97] it is uncertain as to how state courts will rule when faced with this evidentiary dilemma. Presumably, if the language of a state's rule of evidence is identical to federal Rule 702, the state court may rely on *Daubert*'s analysis in reaching its own decision.[98] If a state's evidentiary rule is strikingly different from the federal rule, it may be difficult to convince the state court's trial judge to exclude an economist's "expert" testimony on the grounds that it is unreliable and lacks probative value.

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[95] *Id.* at 1062-63. The court heavily criticized Stan Smith's reliance upon a work by well-known economist Adam Smith, in an effort to add credence to his concept on valuing lost pleasures of living. *Id.*

[96] *See supra* notes 72, 93 and 94.

[97] *See* Sullivan v. United States Gypsum Co., 862 F. Supp. 317, 321 (D. Kan. 1994) (barring Stan Smith's testimony on hedonic damages under *Daubert*); Chustz v. J. B. Hunt Transp., Inc., 659 So. 2d 784, 785 (La. Ct. App. 1995) (excluding testimony of Stan Smith as to value of life). For pre-*Daubert* cases that barred expert testimony on hedonic damages, see Foster v. Trafalgar House Oil & Gas, 603 So. 2d 284, 286 (La. Ct. App. 1992) (holding that expert witness's testimony was too speculative to be submitted for jury evaluation); Fetzer v. Wood, 569 N.E.2d 1237, 1247 (Ill. Ct. App. 1991) (excluding testimony on hedonic damages on grounds that "expert testimony on damages . . . are not amenable to . . . analytical precision."); Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677, 680-82 (Ind. Ct. app. 1991) (prohibiting expert testimony on decedent's survivor's loss of enjoyment of life); Livingston v. United States, 817 F. Supp. 601, 606 (E.D. N.C. 1993) (stating expert's testimony regarding hedonic damages "neither rest on a reliable foundation nor does it assist the court"). *But see* Sena v. New Mexico State Police, 892 P.2d 604, 611 (N.M. Ct. App. 1995) (allowing expert testimony on hedonic damages as long as person is qualified expert).

[98] *See* Nancy A. Miller, *Daubert and Junk Science: Have Admissibility Standards Changed?*, 61 DEF. COUNS. J. 501, 514-15 (Oct. 1994) (discussing West Virginia's use of *Daubert* in determining admissibility of testimony by hedonic damages expert in state court).

IV. MISSISSIPPI: UNRESOLVED ISSUES SURROUNDING CLAIMS FOR HEDONIC DAMAGES

A. *Mississippi's Wrongful Death Statute and Hedonic Damages*

The Mississippi Supreme Court's position on hedonic damages in wrongful death cases is, at best, confusing. The lack of solid authority from the court on the subject has left the law in Mississippi in a state of uncertainty. In fact, the only reported commentary on the matter is a dissent[99] and a concurrence[100] authored by former Supreme Court Justice Robertson.

Justice Robertson, who favors recovery of hedonic damages, relied on the wording of Mississippi's wrongful death statute[101] in reaching his conclusion that Mississippi provides for hedonic damage awards within the boundaries of the statutory language.[102] The statute specifically states that the jury may "tak[e] into consideration all the damages of every kind to the decedent . . . ."[103] According to Justice Robertson, the court should literally construe the phrase to include every loss incurred by the decedent, including his lost chance to enjoy the pleasures of living.[104] Excluding compensation for loss of enjoyment of life, in his opinion, only serves to frustrate the tort system's goal of making the plaintiff whole.[105]

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[99] *See* McGowan v. Estate of Wright, 524 So. 2d 308, 311-13 (Miss. 1988) (Robertson, J., dissenting) (arguing that language of MISS. CODE ANN. § 11-7-13 encompasses hedonic damages within remedies it provides). The majority opinion never states that hedonic damages were an issue in *McGowan*. In fact, the opinion was limited to a discussion of the present net cash value of the decedent's life, loss of society and companionship, and certain special damages under § 11-7-13. *Id.* at 311.

[100] *See* Jones v. Shaffer, 573 So. 2d 740, 744 (Miss. 1991) (Robertson, J., concurring) (contending that hedonic damages were recoverable under Mississippi's wrongful death statute). Once again, hedonic damages was not an issue on appeal to the Mississippi Supreme Court, yet Justice Robertson rendered a concurring opinion discussing hedonic damages in wrongful death cases. *Id.* at 744-46 (Robertson, J., concurring). And, like *McGowan*, Justices Hawkins and Sullivan joined in Robertson's opinion. *Id.* at 744 (Robertson, J., concurring). It should be noted that a footnote in the majority opinion expressly provided that the court was not rendering an opinion on hedonic damages. *Id.* at 743 n.2. Instead, the court listed the types of damages it had allowed under MISS. CODE ANN. § 11-7-13 in the past. *Id.* The court did not recognize hedonic damages as a previously recognized category of compensable damages. *Id.*

[101] Mississippi's current version of its wrongful death statute is codified at MISS. CODE ANN. § 11-7-13 (Supp. 1996). Although the statutory language provides for " . . . such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit", the Mississippi Supreme Court has never included hedonic damages as a separate category of damages recoverable under the statute. Miss Code Ann. § 11-7-13 (Supp. 1995); *see infra* note 102.

Subsequent majority opinions have yet to espouse or disclaim Justice Robertson's assertions that hedonic damages are actionable under Mississippi's wrongful death statute.[106] Meanwhile, the federal courts have concluded that if faced with the issue, the Mississippi Supreme Court would deny recovery.[107] On that basis, a Mississippi federal district court has dismissed the hedonic damages component of a lawsuit when challenged by the defendant through a summary judgment motion.[108]

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[102] *See Jones*, 573 So. 2d at 744 (Robertson, J., concurring); *McGowan*, 524 So. 2d at 312-13 (Robertson, J., dissenting). Justice Robertson contended that the court's interpretation of the statutory language had become "too restrictive" and should provide for any type of damages incurred by the decedent. *Id.* at 312 (Robertson, J., dissenting). In the past, the court has interpreted the statute to allow damages for "(1) the present net cash value of the life expectancy of the deceased, (2) the loss of the companionship and society of the decedent, (3) the pain and suffering of the decedent between the time of injury and death, and (4) punitive damages." *Id.* at 311. The majority of the court's justices have never stated that hedonic damages are a fifth element of damages allowed under § 11-7-13. *See* Moore v. Kroger Co., 800 F. Supp. 429, 435 (N.D. Miss. 1992), *aff'd*, 18 F.3d 936 (5th Cir. 1994).

[103] MISS. CODE ANN. § 11-7-13 (Supp. 1996).

[104] *Id.* at 312 (Robertson, J., dissenting). In addition, Justice Robertson contended that the decedent's survivors were also entitled to recover hedonic damages under MISS. CODE ANN. § 11-7-13.

[105] *Jones*, 573 So. 2d at 745 (Robertson, J., concurring). Today, most commentators feel that the optimum number of injuries will occur if liability equals actual losses. *Id.* (Robertson, J., concurring).

[106] Interestingly, Justice McRae, writing for the majority of the court in Thomas v. Hilburn, 654 So. 2d 898, 903 (Miss. 1995), cited *McGowan v. Estate of Wright* as authorizing hedonic damages under Mississippi's wrongful death statute. However, the *McGowan* opinion did not involve any claims for hedonic damages. The only reference to loss of enjoyment of life in *McGowan* comes in the form of Justice Robertson's dissent. *See McGowan*, 524 So. 2d at 311-13 (Robertson, J., dissenting).

[107] *See* Moore v. Kroger Co., 800 F. Supp. 429, 435 (N.D. Miss. 1992) (citing *Buckhalter v. Burlington N. R.R.* for finding "that Mississippi law has not recognized hedonic damages in a wrongful death action despite a concurring opinion by

B. Personal Injury Actions and Compensation for the Loss of Enjoyment of Life in Mississippi

Presumably, the Mississippi Supreme Court permits compensation for the diminished capacity to enjoy living that results from an injury sustained at the hands of the defendant. This conclusion is deduced from the fact that the court permits the use of "day in the life" videos during trials to depict life long changes and obstacles endured by the plaintiff post injury.[109] In addition, the Mississippi Supreme Court has referenced the plaintiff's loss of enjoyment of life in several opinions it has rendered in personal injury actions.[110]

Oddly, the Mississippi Supreme Court has never issued a majority opinion that expressly sets forth its position on hedonic damages claims in personal injury cases.[111] If such damages are recoverable in a personal injury action in Mississippi, which they appear to be, then the court should set forth the parameters under which such a claim may be considered

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Justice Robertson favoring such damages."); Buckhalter v. Burlington N. R.R., No. EC 90-139-D-D, 1992 WL 236676, *1 (N.D. Miss. Mar. 23, 1992) (granting partial summary judgment on defendant's motion to dismiss hedonic damages claim after finding that Mississippi did not recognize them under state's wrongful death statute).

[108] *See supra* note 107.

[109] *See* Cayson v. North Miss. Med. Ctr., 471 So. 2d 375, 380 (Miss. 1985) (upholding plaintiff's use of video depicting his life since alleged medical malpractice by defendant); Jesco v. Shannon, 451 So. 2d 694, 702 (Miss. 1984) (permitting jury to view film that depicted treatments plaintiff underwent for burns although plaintiff was not shown in film).

[110] W.J. Runyan & Son, Inc. v. Davis, 605 So. 2d 38, 50 (Miss. 1992) (holding plaintiff entitled to damages for loss of enjoyment of life); General Motors Corp. v. Jackson, 636 So. 2d 310, 315 (Miss. 1992) (holding award that included damages for loss of enjoyment of life not excessive); Atwood v. Lever, 274 So. 2d 146, 148-49 (Miss. 1973) (finding no facts in record to support award of damages based on loss of enjoyment of life).

[111] *See* Moore v. Kroger Co., 800 F. Supp. 429 (N.D. Miss. 1992) (concluding that Mississippi authorized hedonic damages, but only as a part of pain and suffering), *aff'd*, 18 F.3d 936 (5th Cir. 1994).

by the jury. As the law stands, it is unclear whether Mississippi recognizes hedonic damages as a separate category of damages, or whether Mississippi considers the loss of enjoyment of life as a part of conscious pain and suffering or permanent impairment.[112] Consequently, it is virtually impossible to uniformly instruct this state's juries as to the correct posture of the law. This uncertainty could arguably lead to excessive jury verdicts through duplication of damages.[113]

C. *Expert Testimony on Hedonic Damages in Mississippi*

The admissibility of expert testimony on hedonic damages is also an unanswered question in Mississippi. While federal courts in Mississippi have excluded expert testimony on lost pleasures of life on the grounds that the testimony is unreliable and prejudicial,[114] this state's trial courts lack clear guidance on the matter from Mississippi's highest court.

The Mississippi Supreme Court should conclude that, when subjected to the scrutiny of Mississippi's rules of evidence, expert testimony on hedonic damages is unnecessary and lacks credibility. Rule 702 of the Mississippi Rules of Evidence[115] requires the testimony be scientific and "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Jurors are perfectly capable of drawing from their own knowledge and experiences in determining the effect an injury has had on a plaintiff's ability to enjoy living.[116] Such arbitrary and speculative "expert" testimony would not aid the juror in determining hedonic damages because the economist's figures are not grounded in tested scientific data.[117] Therefore, any expert testimony offered into evidence at trial through Rule 702 of the Mississippi Rules of Evidence should be excluded.

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[112] *See supra* note 111 and accompanying text.

[113] *See supra* notes 11, 62 and text accompanying both notes.

[114] *See supra* note 107.

[115] Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." MISS. R. EVID. 702.

[116] Fetzer v. Wood, 569 N.E.2d 1237, 1246 (Ill. Ct. App. 1991) (quoting Caley v. Manicke, 182 N.W.2d 206 (Ill. 1962). The court went on to discuss that this method is less misleading than a mathematical formula. *Id.*; *see* Parker Cashdollar & Marsha Cope Hute, *Reliability and Validity of Hedonic Damage Testimony: Judicial Logic About Economic Science in Merrell Dow and Mercado*, 3 J.

V. CONCLUSION

It is conceivable that hedonic damages should have some position in Mississippi's law on damages in personal injury cases. For instance, a plaintiff who has been severely injured through the defendant's negligence will often undergo drastic and undesired changes in his or her day-to-day existence. As long as the plaintiff is conscious of his or her lost enjoyment of life's pursuits and pleasures, Mississippi's tort system should compensate for the loss.[118] However, in order to avoid duplication of damages, the Mississippi Supreme Court should define recoverable hedonic damages as those which make up the "suffering" component of pain and suffering.[119] Simply stated, hedonic damages should not be a separate element of general damages.

Inevitably, the Mississippi Supreme Court will be called upon to firmly address whether hedonic damages are recoverable in wrongful death cases brought pursuant to § 11-7-13 of the Mississippi Code. First, as former Justice Robertson points out, although the statute allows the jury to contemplate "all the damages of every kind" incurred by the decedent, the statute also limits recoverable damages to those permitted by

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LEGAL ECON. 57, 63 (1993) (quoting language from *Mercado v. Ahmed* in which Judge Zagel questioned how expert testimony on hedonic damages could benefit jury in its fact-finding task).

[117] *Fetzer*,569 N.E.2d at 1247. The court held the use of expert testimony in this case would invade the province of the jury. *Id.*; *see also* Ted R. Miller, *The Plausible Range for the Value of Life-Red Herrings Among the Mackerel*, 3 J. FORENSIC ECONOMISTS 17, 17 (Fall 1990) (noting "wide range" and "serious flaws" in economists' studies on value of life as "hinder[ing] credib[ility] . . . of willingness to pay in benefit cost analysis" and offering solutions to correct problems).

[118] *See supra* notes 57-59 and accompanying text.

[119] *See supra* notes 10, 61-63 and text accompanying these notes.

law.[120] As of this writing, the court has yet to issue an opinion expanding the damages that may be recovered under § 11-7-13 of the Mississippi Code to include hedonic damages.[121] Therefore, the court should conclude that such damages are not included in those categories permitted by Mississippi's wrongful death statute.

Second, the court should follow the legal reasoning set forth by the majority of American courts in denying recovery of hedonic damages under their states' wrongful death statutes.[122] As suggested by most jurisdictions, damages for the decedent's loss of enjoyment of life are speculative and are particularly inappropriate in cases where the defendant's wrongdoing caused immediate death.[123] Finally, because the decedent cannot personally testify as to the pleasure that he derived from living and has lost as a result of the tortfeasor's negligence, any compensation awarded by the jury in a wrongful death case would be based on pure conjecture.

If the Mississippi Supreme Court determines that hedonic damages are appropriate in certain types of cases and defines the parameters under which they may be recovered, the court must then decide whether expert testimony on the subject is admissible in Mississippi courts. Given the fact that the language of Rule 702 of the Mississippi Rules of Evidence is identical to that of Rule 702 of the Federal Rules of Evidence, the court should follow the guidelines for admissibility set forth by the United States Supreme Court in *Daubert*.[124] Under *Daubert*'s analysis, the court should conclude that expert testimony as to the loss of enjoyment of life is unscientific and must be excluded from the Mississippi courtroom.[125] A contrary result is likely to lead to confusion in the minds of the jurors and result in excessive damages, which would only serve to punish[126] the defendant and provide a windfall for the plaintiff.[127]

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[120] *See supra* note 101.

[121] *See supra* note 102.

[122] *See supra* notes 30-38 and accompanying text.

[123] *See supra* notes 27-28 and accompanying text.

[124] *See supra* text accompanying notes 74-83 and 97.

[125] *See supra* notes 84-83 and accompanying text. Mississippi law already requires an expert's opinion testimony to be scientifically sound. Hardy b. Brantley, 471 So. 2d 358, 366 (Miss. 1985). Speculative testimony by an expert is strictly prohibited under this state's application of Mississippi Rule of Evidence 702. Fowler v. State, 566 So. 2d 1194, 1200 (Miss. 1990). As expert testimony on

As more claims for hedonic damages appear in complaints filed in Mississippi courts, unresolved issues in this area of the law will become more pronounced. A response through adjudication by the Mississippi Supreme Court is needed in order to clarify the state's position on hedonic damages and the admissibility of expert testimony in those cases. A firm stance which prohibits expert testimony, bars recovery in wrongful death actions, but allows hedonic damages as part of conscious pain and suffering in personal injury actions will render a just result and fulfill the purpose of Mississippi's tort system.

Virginia Smith Gautier

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hedonic damages is speculative and not grounded in science in this author's opinion, it should be excluded.

[126] *See supra* note 49 and text accompanying note 62.

[127] *See supra* note 11.

RECENT DECISION

TORTS—INFLICTION OF EMOTIONAL DISTRESS—RECOVERY FOR FEAR OF FUTURE ILLNESS PREDICATED ON PROOF OF EXPOSURE AND RATIONAL FEAR

Thomas Ferguson and his wife, Bonnie, lived approximately one hundred twenty-five miles downriver from a paper mill operated by Leaf River Forest Products.[1] Authorities detected a toxic substance, dioxin, in the mill's discharged waste water, and subsequent testing revealed dioxin contamination in fish caught from the Leaf River.[2] The Fergusons sued Leaf River Forest Products, alleging emotional distress based on fear of toxic-related cancer.[3]

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[1] Leaf River Forest Prods., Inc. v. Ferguson, 662 So. 2d 648, 651 (Miss. 1995). The Fergusons had lived on the Pascagoula River since 1960. *Leaf River*, 662 So. 2d at 651. Leaf River Forest Products owned a paper mill located on the Leaf River, which eventually merges to form the Pascagoula River. *Id.*

[2] *Id.* at 650, 653. Testing revealed that 2,3,7,8-tetrachlorodibenzo-p-dioxin was a by-product of the mill's pulp making process. *Id.* at 650. As a result of dioxin contamination, both the Leaf and Pascagoula Rivers were closed to commercial fishing, and consumption advisories were issued on fish caught from these rivers. *Id.*

[3] *Id.* at 651. Although the Fergusons refused to have their blood or property tested for dioxin, each alleged fear of cancer due to the large amounts of fish they had eaten from the Pascagoula River, and from recent floods of their land. *Id.* In the original action, the Fergusons were among eleven plaintiffs who filed suit against the following defendants: Leaf River Forest Products, Inc.; Great

After trial in Jackson County Circuit Court, a jury awarded the Fergusons $90,000 each in emotional distress damages, and $3,000,000 in punitive damages.[4] On appeal, the Mississippi Supreme Court held: Reversed and rendered.[5] The court held that where an action is brought for negligent infliction of emotional distress based on fear of future illness, the claim must be supported by exposure to the dangerous agent, and by medical evidence indicating a rational basis for the fear.[6]

I. RELATED LAW

A. *Emotional Distress Law in Mississippi*

In the early case of *Saenger Theatres Corp. v. Herndon*,[7] the Mississippi Supreme Court allowed recovery for emotional distress based on the defendant's conduct.[8] In *Saenger Theatres*, the plaintiff sought damages for mental suffering

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Northern Nekoosa Corporation and its parent company, Georgia-Pacific Corporation; Warren Richardson, general manager of the mill; and Acker Smith, manager of environmental affairs. *Id.* at 651, 653. After amended complaints, the Fergusons and Louise H. Mitchell remained as plaintiffs, and based their suit on negligence, strict liability, nuisance, and trespass. *Id.* at 650-51. The remaining plaintiffs also added Leaf River Corporation, the parent company of Leaf River Forest Products, Inc., as a defendant. *Leaf River*, 662 So. 2d at 651.

[4] *Id.* The jury awarded the Fergusons $10,000 each on their nuisance claim, and found for the defendants as to all claims made by Louise Mitchell. *Id.* at 650.

[5] *Id.* The supreme court reversed the emotional distress and the nuisance verdicts. *Id.* at 665.

[6] *Leaf River*, 662 So. 2d at 650. The court stated that the Fergusons presented no evidence proving that they had been exposed to dioxin, and also noted the lack of any medical evidence indicating possible future illness. *Id.* at 658. In discussing the medical evidence requirement, the court indicated that there must be proof of "possible or probable future illness." *Id.*

[7] 178 So. 86 (Miss. 1938).

[8] *Saenger Theatres*, 178 So. at 87. Earlier Mississippi decisions applied the rule that recovery for mental distress was not compensable absent physical injury. Doherty v. Miss. Power Co., 173 So. 287, 289 (Miss. 1937); *see also* Miss. Power Co. v. Byrd, 133 So. 193, 195 (Miss. 1931) (refusing to hold that mental distress alone was compensable); Mobile & O.R. v. Flannagan, 105 So. 749, 749-50 (Miss. 1925) (holding that there could be no recovery for mental distress without accompanying physical injury). *But cf.* Continental Casualty Co. v. Garrett, 161 So. 753, 755 (Miss. 1935) (allowing recovery for physical harm resulting from insult).

after the theater refused to honor her ticket.[9] The Mississippi Supreme Court held that mental anguish resulting from "wanton or shamefully gross wrong" was compensable, notwithstanding absence of physical injury.[10] In subsequent decisions, the Mississippi Supreme Court applied this standard to cases where the defendant's conduct was malicious, grossly careless, grossly reckless, or intentional.[11] After *Saenger Theatres*, the court continued to require physical injury for recovery in emotional distress actions based on negligence.[12]

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[9] *Saenger Theatres*, 178 So. at 87. The theater learned that the plaintiff, a fourteen-year-old girl, had allegedly been disruptive at previous shows. *Id.* The doorman subsequently refused to allow her in the theater, and used abusive language towards her in the presence of others. *Id.* The plaintiff presented evidence that she needed sedatives to alleviate the mental anguish caused by the defendant's conduct. *Id.* A jury awarded the plaintiff $1,000 in punitive damages. *Id.*

[10] *Id.*; *see, e.g.*, Western Union Tel. Co. v. Rogers, 9 So. 823, 825 (Miss. 1891) (stating that mental distress damages have been allowed in cases involving willful conduct). Traditionally, courts have more willingly accepted the tort of intentional rather than negligent infliction of emotional distress, reasoning that distress is more likely to be caused by intentional conduct. Amy L. Hansen, Note, *Establishing Uniformity in HIV-Fear Cases: A Modification of the Distinct Event Approach*, 29 VAL. U.L. REV. 1251, 1264 (1995).

[11] *See* Daniels v. Adkins Protective Serv., Inc., 247 So. 2d 710, 711 (Miss. 1971) (stating that distress was compensable absent bodily injury where defendant acted maliciously, intentionally, grossly negligent, or grossly careless). The supreme court also required that defendant's conduct "show an utter indifference to the consequences." Lyons v. Zale Jewelry Co., 150 So. 2d 154, 158 (Miss. 1963); *see also* Fuselier, Ott, & McKee, P.A. v. Moeller, 507 So. 2d 63, 66, 69 (Miss. 1987) (concluding that firm's discharge of lawyer was not willful, wanton, malicious, or intentional); T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481, 485 (Miss. 1972) (reciting proximate cause standard).

[12] *See, e.g.*, Arnold v. Spears, 63 So. 2d 850, 855-56 (Miss. 1953) (denying emotional distress recovery where plaintiff did not have bodily injury). The majority of courts have required "accompanying physical injury, illness, or other physical consequences" to recover in emotional distress actions based on negligence. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361 (5th ed. 1984). Claimants have satisfied the injury requirement by demonstrating a physical injury acquired on impact, or resulting from emotional distress. Brian R. Garves, *Emotional Distress Caused by Fear of Future Disease*, 24 AM. JUR. PROOF OF FACTS 3d. 273, 295 (1994). Courts employed the physical injury requirement due to concerns over the genuineness of emotional distress claims. *Id.*

B. The Demise of the Impact Doctrine

In *First National Bank v. Langley*,[13] the Mississippi Supreme Court abandoned the physical impact doctrine.[14] In *Langley*, the plaintiff suffered emotional distress after a bank negligently lost his deposit.[15] In affirming the trial court's judgment for the plaintiff,[16] the Mississippi Supreme Court surveyed the declining status of the physical impact doctrine in other jurisdictions, and concluded that the doctrine should be repudiated in Mississippi.[17] The court reasoned that the impact doctrine forced otherwise genuine claims to be dismissed simply because the claimant could show no impact.[18]

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[13] 314 So. 2d 324 (Miss. 1975).

[14] *First Nat'l Bank*, 314 So. 2d at 339. Courts subsequently abandoned the rule that physical harm must result from impact in emotional distress cases based on negligence, but the requirement of some form of physical impact remained. Mary Donovan, Comment, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 UCLA L. REV. 1337, 1349 (1994).

[15] *First Nat'l Bank*, 314 So. 2d at 328. The plaintiff managed an A & P grocery store in Jackson, Mississippi. *Id.* at 326. He made a store deposit in the night deposit box at the First National Bank, which normally forwarded duplicate deposit slips to the New Orleans A & P branch. *Id.* Subsequently, the New Orleans office informed the plaintiff that the deposit was never received. *Id.* Plaintiff repeatedly asked the bank to search for the deposit, but the bank failed to find it. *Id.* Three weeks later, authorities found the deposit stuck in the night deposit box. *First Nat'l Bank*, 314 So. 2d at 327.

[16] *Id.* at 339. At trial, evidence revealed that the plaintiff was under suspicion from management when the bag could not be found, resulting in his demotion to another store. *Id.* at 327. A psychiatrist testified that the plaintiff suffered from depression and was diagnosed with angioneurotic edema, which caused swelling in and around the plaintiffs mouth. *Id.* at 328. The jury awarded the plaintiff $5,339. *Id.* at 325.

[17] *Id.* at 332-35, 339. The court noted that an increasing number of states had abandoned the impact doctrine. *Id.* at 332; *see, e.g.*, Daley v. LaCroix, 179 N.W.2d 390, 395 (Mich. 1970) (renouncing impact doctrine); Battalla v. State, 176 N.E.2d 729, 729, 732 (N.Y. 1961) (reversing lower court's holding that there could be no recovery for injuries resulting from negligently induced fright). Today, only six states have not repudiated the impact doctrine. Robert C. Bollinger, Commentary, *On the Road to Recovery for Emotional Harm*, 16 J. LEGAL MED. 417, 425 (1995). *See, e.g.*, Gilliam v. Stewart, 291 So. 2d 593, 595 (Fla. 1974) (refusing to abandon impact doctrine).

[18] *First Nat'l Bank*, 314 So. 2d at 339. The impact rule often resulted in arbitrary holdings, where courts allowed trivial and minor occurrences to constitute a sufficient impact. Hansen, *supra* note 10, at 1267-68.

While renouncing the impact doctrine, the *Langley* court did not indicate whether subsequent physical injury must be demonstrated to recover for negligent infliction of emotional distress.[19] After *Langley*, the Mississippi Supreme Court attempted to define the requirements needed to recover for negligent infliction of emotional distress, and began requiring "satisfactory proof" of injury absent physical impact.[20]

C. Reasonable Foreseeability and the "Medically Cognizable" Requirement

The Mississippi Supreme Court clarified the requirements needed to recover for emotional distress in *Sears, Roebuck & Co. v. Devers*.[21] In *Sears*, the plaintiff alleged negligent infliction of emotional distress after being detained by Sears' employees, who mistakenly suspected her of shoplifting.[22] In denying recovery, the Mississippi Supreme Court held that if the defendant's conduct evoked outrage, damages may be awarded for emotional distress provided the results are reasonably foreseeable.[23] The court also stated that in cases of emotional distress resulting from simple negligence, recovery is allowed if the results are reasonably foreseeable,[24] and accompanied by a "medically cognizable" condition.[25]

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[19] *First Nat'l Bank*, 314 So. 2d at 339. The court cited *Saenger* for the proposition that no subsequent injury is required in cases where the defendant's acts are willful or wanton. *Id.* at 338. However, for negligence actions, the court stated that claimants must show "genuine cases of injury," but did not clarify whether this required a plaintiff to demonstrate a subsequent physical injury. *Id.* at 339. Many jurisdictions that abandoned the physical impact doctrine have espoused the requirement that physical injury occur subsequent to emotional distress in order to recover. Donovan, *supra* note 14, at 1353, 1355. The Restatement (Second) of Torts has stated that a party is not liable for negligence which does not produce bodily harm. RESTATEMENT (SECOND) TORTS § 436A (1965).

[20] Aldridge v. Johnson, 318 So. 2d 870, 873 (Miss. 1975). The *Aldridge* court determined that plaintiff's evidence as to nervousness and anxiety was too speculative to fulfill the satisfactory proof requirement. *Aldridge*, 318 So. 2d at 873. The supreme court subsequently interpreted *Langley* as requiring "satisfactory proof" of subsequent physical injury to recover for emotional distress. Sears, Roebuck & Co. v. Young, 384 So. 2d 69, 73 (Miss. 1980); *see also* Entex, Inc. v. McGuire, 414 So. 2d 437, 444 (Miss. 1982) (citing *Langley* to support recovery for trauma after plaintiff nearly lost his wife in fire caused by defendant).

[21] 405 So. 2d 898 (Miss. 1981).

[22] *Sears*, 405 So. 2d at 899. Plaintiff activated an alarm while attempting to exit Sears, and several employees apprehended her and checked her bags. *Id.* Upon inspection, the employees discovered that a tag had not been removed from one of plaintiff's purchases, thereby causing the alarm to sound. *Id.* The plaintiff did not consult a physician or require medication following the incident, but alleged that she suffered emotional trauma and humiliation. *Id.*

D. Emotional Distress Based on Fear of Future Illness

1. The Fifth Circuit and Fear of Cancer

While the Mississippi Supreme Court has allowed recovery for fear,[26] other jurisdictions have addressed emotional distress claims based on fear of future illness.[27] In *Jackson v. Johns-Manville Sales Corp.*[28], the Fifth Circuit, interpreting

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[23] *Id.* at 902. The court reasoned that, in such cases, it is the defendant's conduct that justifies an award for emotional distress, rather than the consequences of that conduct. *Id.*; *see also* McFadden v. State, 580 So. 2d 1210, 1217 (Miss. 1991) (refusing damages where plaintiff failed to allege outrageous conduct). The Restatement (Second) of Torts has also stated that emotional distress is compensable when arising from outrageous conduct. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[24] *Sears*, 405 So. 2d at 902. The reasonable foreseeability test has served to establish proximate cause or breach of a defendant's duty. Donovan, *supra* note 14, at 1376.

[25] *Sears*, 405 So. 2d at 902. The court stated that there must be a subsequent physical or mental illness which requires or necessitates medical treatment. *Id.*; *see* Finkelberg v. Luckett, 608 So. 2d 1214, 1221-22 (Miss. 1992) (determining that plaintiff did not establish sufficient proof of mental anguish after defendant's negligence); Strickland v. Rossini, 589 So. 2d 1268, 1275-76 (Miss. 1991) (holding that testimony by plaintiff's boyfriend that plaintiff had been depressed was not sufficient proof); Wirtz v. Switzer, 586 So. 2d 775, 784 (Miss. 1991) (acknowledging that in negligence cases damages may be awarded if there is subsequent injury requiring medical treatment).

[26] *See* Occhipinti v. Rheem Mfg. Co., 172 So. 2d 186, 190 (Miss. 1965) (stating that mother may recover for fear of miscarriage after accident with defendant). The Mississippi Supreme Court also stated that recovery may be allowed for future consequences of injury if established with reasonable probability. Entex, Inc. v. Raspberry, 355 So. 2d 1102, 1104 (Miss. 1978).

[27] *See, e.g.*, Devlin v. Johns-Manville Corp., 495 A.2d 495, 499 (N.J. Super. Ct. Law Div. 1985) (allowing recovery for fear of future cancer). In typical emotional distress claims based on fear of future illness, courts have required exposure to a dangerous element caused by defendant's conduct, resulting in a reasonable fear of contracting a future disease. Garves, *supra* note 12, at 292.

[28] 781 F.2d 394 (5th Cir.) (en banc), *cert. denied*, 478 U.S. 1022 (1986).

Mississippi law, allowed recovery for emotional distress based on fear of asbestos-related cancer. In *Jackson*, the plaintiff filed suit against several asbestos manufacturers after his prolonged exposure led to asbestosis.[29] The Fifth Circuit stated that recovery for fear may be available where the probability of developing cancer exceeds fifty percent, reasoning that this requirement would ensure the validity of future illness claims.[30] The court then held that mental distress was compensable when accompanied by a subsequent physical injury, which the court determined was satisfied by evidence of the plaintiff's asbestosis.[31] While the Fifth Circuit required a subsequent physical injury to recover for fear of asbestos-related cancer,[32] other jurisdictions have addressed fear of cancer resulting from chemical exposure where there was no physical injury.[33]

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[29] *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1316 (5th Cir.) (en banc), *question certified*, 757 F.2d 614 (5th Cir.), *certification declined*, 469 So. 2d 99 (Miss. 1985) (en banc), *aff'd*, 781 F.2d 394 (5th Cir.) (en banc), *cert. denied*, 478 U.S. 1022 (1986). The plaintiff alleged that he was exposed to asbestos from 1953 to 1971 during his employment with a shipbuilding company. *Jackson*, 750 F.2d at 1316. Doctors subsequently diagnosed the plaintiff with asbestosis. *Id.* The plaintiff filed suit against asbestos manufacturers based on strict liability in tort. *Id.* At trial, three expert witnesses testified that the plaintiff's chances of eventually contracting cancer were greater than fifty percent. *Id.* at 1319.

[30] *Jackson*, 781 F.2d at 413 n.25, 414. The Fifth Circuit declined to consider whether damages were recoverable for a claimant who could not meet this requirement. *Id.* at 413 n.25. Traditionally, courts have not required that the feared disease be reasonably certain to occur to recover for fear of future disease. Donovan, *supra* note 14, at 1372; *see* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983) (stating that future illness does not demand evidence of high degree of likelihood to be reasonable). *But see* Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1138 (5th Cir. 1985) (allowing recovery upon demonstration of medical probability that feared illness will develop).

[31] *Jackson*, 781 F.2d at 414. The court also stated that recovery was available if caused by "wilful, gross, or wanton" conduct. *Id.* A majority of jurisdictions have required proof of subsequent physical injury in fear of future illness claims. Donovan, *supra* note 14, at 1369-70; *see, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (3d Cir. 1986) (holding that under New Jersey law fear of asbestos-related cancer is compensable when accompanied by physical injury).

[32] *Jackson*, 781 F.2d at 414. Courts have required that the plaintiff's fear of contracting cancer be reasonable. *Devlin*, 495 A.2d at 499. Some courts have determined that a generalized fear is insufficient to satisfy the reasonableness test; instead, only a showing of physical injury or "functional impairment" will suffice. *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990).

2. *Fear of Cancer Resulting from Chemical Exposure*

In *Potter v. Firestone Tire & Rubber Co.*,[34] the California Supreme Court addressed emotional distress based on fear of cancer where the plaintiffs did not sustain a physical injury.[35] In *Potter*, plaintiffs who owned property near a landfill sued Firestone, alleging fear of cancer due to chemical exposure caused by Firestone's waste disposal practices.[36] The California Supreme Court held that without the presence of physical injury in a fear of future cancer action based on negligence, recovery is predicated on proof that it is "more likely than not" that cancer will occur.[37] The court reasoned that this approach reflected several public policy considerations, including the need to control toxic tort litigation, and the demand for consistency in fear of cancer actions.[38] Although proof of exposure has been the basis of fear of illness actions, many courts have encountered claims based on fear of AIDS where exposure to the virus could not be demonstrated.[39]

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[33] Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENVTL. L. 285, 285 (1994). In chemical exposure cases, courts have required plaintiffs to prove a psychological injury caused by exposure, and evidence concerning the possibility of future illness. *Id.* at 285-86.

[34] 863 P.2d 795 (Cal. 1993).

[35] *Potter*, 863 P.2d at 800. The Fifth Circuit interpreted Louisiana law in addressing a similar claim, and stated that fear of future cancer resulting from toxic exposure was compensable when the fear was reasonable. Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 318 (5th Cir. 1986). Initially, courts required physical impact to recover in toxic tort litigation, which was generally satisfied by evidence of toxic ingestion. Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?*, 53 FORDHAM L. REV. 527, 546-47 (1984). As jurisdictions began repudiating the physical impact doctrine, a majority of courts required proof of subsequent physical injury arising from exposure. Frances C. Whiteman, Comment, *Toxic Emotional Distress Claims: The Emerging Trend for Recovery Absent Physical Injury*, 20 CAP. U. L. REV. 995, 995 (1991).

[36] *Potter*, 863 P.2d at 801. Firestone dumped large amounts of toxic waste at a landfill which prohibited toxic disposals. *Id.* The plaintiffs, who lived adjacent to the landfill, discovered toxic substances, many of which were known or suspected human carcinogens, in their water wells. *Id.* at 801-02. The trial court determined that the plaintiffs' risk of contracting cancer had been "enhanced" by toxic exposure. *Id.* at 802; *cf.* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1206 (6th Cir. 1988) (stating that damages may be awarded if reasonable, even though "future disease . . . is not likely to occur"); Wisner v. Ill. Cent. Gulf R.R., 537 So. 2d 740, 748 (La. Ct. App. 1988) (asserting that claimant may recover without evidence that cancer will "more likely than not" occur, as long as fear is justified).

[37] *Potter*, 863 P.2d at 800. The California Supreme Court concluded that fear

3. *Emotional Distress Based on Fear of AIDS*

The District Court for the Eastern District of Pennsylvania discussed emotional distress based on fear of developing AIDS in *Burk v. Sage Products.*[40] In *Burk*, a used medical syringe, which was protruding from a disposable container,

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of toxic-related cancer damages were compensable only when the plaintiff demonstrated exposure to a toxin resulting from defendant's breach of duty. *Id.* at 816. The court declined to require physical injury as a predicate for recovery, stating that the injury requirement was an artificial and inferior method of screening false claims. *Id.* at 809-10. As for intentional infliction of emotional distress, the court adopted a reasonableness test rather than the "more likely than not" approach, but denied recovery where the defendant's conduct was not directed at the plaintiff. *Id.* at 820-21.

[38] *Id.* at 812, 813-14. The court noted three additional policy reasons for adopting the "more likely than not" approach: the standard ensures recovery for plaintiffs who actually develop cancer; it restricts the class of plaintiffs, allowing emotional distress absent physical injury to remain a compensable damage; without it, the threat of lawsuits could reduce the availability of new prescription drugs. *Id.* at 812-14. The *Potter* court conceded that the "more likely than not" approach would probably prevent recovery for some plaintiffs who had genuine fears. *Id.* at 814.

[39] Mandana Shahvari, Comment, *AFRAIDS: Fear of AIDS as a Cause of Action*, 67 TEMP. L. REV. 769, 771 (1994). In fear of AIDS cases, the claimant may have a subjective fear after exposure to an HIV-carrier, even though there was not exposure to the virus itself. Lauren J. Camillo, Comment, *Adding Fuel to the Fire: Realistic Fears or Unrealistic Damages in AIDS Phobia Suits?*, 35 S. TEX. L. REV. 331, 346 (1994). The Maryland Supreme Court allowed a claim where the plaintiffs were exposed to an HIV-infected person, even though the virus was not transmitted. Faya v. Almaraz, 620 A.2d 327, 336-37 (Md. 1993). The *Faya* court based recovery on the reasonableness of the plaintiffs' fears, which was supported by evidence of physical manifestations such as headaches and sleeplessness. *Faya*, 620 A.2d at 338-39. The *Faya* court acknowledged, however, that the fear of contracting AIDS may be unreasonable after HIV-negative tests, since it is almost medically certain that HIV antibodies will be detected within six months of exposure. *Id.* at 337.

[40] 747 F. Supp. 285 (E.D. Pa. 1990).

punctured the plaintiff.[41] The plaintiff conceded that he could not prove the needle was contaminated, but alleged that there were AIDS patients on the hospital floor during the time he was stuck.[42] The district court granted the defendant's motion for summary judgment, and held that an emotional distress action based on fear of contracting AIDS was predicated on actual exposure to the virus.[43] The court also indicated that a claimant must demonstrate a physical injury resulting from exposure.[44]

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[41] *Burk*, 747 F. Supp. at 286. The plaintiff worked as a paramedic at a medical center when he was pierced by a used syringe. *Id.* The needle protruded from a container manufactured by the defendant for the disposal of medical syringes. *Id.* The plaintiff brought a products liability action against the defendant based on negligence, breach of warranty, and strict liability. *Id.*

[42] *Id.* The plaintiff admitted that he had been tested for HIV on five occasions since the incident, and that each test was negative. *Id.* In jurisdictions requiring proof of exposure, courts have relied on HIV test results as an important tool in demonstrating actual exposure to the virus. Shahvari, *supra* note 39, at 772. The *Burk* court asserted that since the plaintiff had consistently tested negative for HIV, it was almost a medical certainty that he had not been exposed. *Burk*, 747 F. Supp. at 288.

[43] *Id.* Some courts have required proof of exposure to the HIV virus in fear of AIDS actions. Shahvari, *supra* note 39, at 772. The Supreme Court of Tennessee debated over whether to adopt the "actual exposure" standard, noting the "unique deadliness of AIDS," and the possible latency period of HIV. Carroll v. Sisters of St. Francis Health Servs., Inc., 868 S.W.2d 585, 592-93 (Tenn. 1993). The *Carroll* court adopted the "actual exposure" approach, however, reasoning that it provided an objective standard for negligence claims, and prevented recovery based solely on subjective fears. *Carroll*, 868 S.W.2d at 593, 594.

[44] *Burk*, 747 F. Supp. at 286-87. The court acknowledged that the plaintiff satisfied the physical injury requirement by presenting evidence of impotency resulting from the accident. *Id.* at 287. The court concluded, however, that the plaintiff's physical injury did not result from actual exposure to the disease, but instead resulted from fear of exposure. *Id.* at 288. Numerous courts have required that a plaintiff demonstrate physical injury in fear of AIDS cases. James C. Maroulis, Note, *Can HIV-Negative Plaintiffs Recover Emotional Distress Damages for Their Fear of AIDS?*, 62 FORDHAM L. REV. 225, 232-33 (1993). Evidence of initial physical injury resulting from contact, or subsequent physical injury resulting from emotional distress has satisfied the injury requirement. *Id.* at 233. Thus, plaintiffs who sustained some physical injury during actual exposure to the AIDS virus have recovered damages for fear even though subsequent HIV-testing was negative, because the physical injury verified the genuineness of the claim. *Id.* at 233-34; *see* Johnson v. W. Va. Univ. Hosps., Inc., 413 S.E.2d 889, 891, 892, 894 (W. Va. 1991) (allowing HIV-negative plaintiff to recover after being bitten on arm by AIDS patient).

II. LEAF RIVER FOREST PRODUCTS, INC. V. FERGUSON

A. *Opinion of the Court*

In *Leaf River Forest Products, Inc. v. Ferguson*,[45] the Mississippi Supreme Court addressed the issue of whether damages may be awarded for emotional distress based on fear of a future illness. The court acknowledged that, under Mississippi law, intentional infliction of emotional distress is compensable.[46] The court then noted that the defendant's conduct did not rise to the level necessary to sustain an action for intentional infliction of emotional distress.[47]

The supreme court observed that Mississippi law also recognized the tort of negligent infliction of emotional distress.[48] The court stated that, although emotional distress could be negligently inflicted in a number of ways, plaintiff had failed to prove any infliction.[49] In reversing the lower court's decision, the Mississippi Supreme Court asserted that there must be proof of exposure to a dangerous substance, and medical evidence of potential future illness to recover for fear of future illness.[50] The court concluded that recovery for emotional distress based on fear of future illness was preserved in Mississippi in cases where sufficient evidence could be demonstrated.[51]

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[45] 662 So. 2d 648 (Miss. 1995).

[46] *Leaf River*, 662 So. 2d at 658. The *Leaf River* court stated that Mississippi had frequently considered claims of intentional infliction of emotional distress. *Id.* at 659 (citing Fuselier, Ott, & McKee, P.A. v. Moeller, 507 So. 2d 63, 69 (Miss. 1987); T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481, 485 (Miss. 1972); Lyons v. Zale Jewelry Co., 150 So. 2d 154, 158 (Miss. 1963)). The majority cited Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981), where the supreme court stated that if the defendant's conduct "evokes outrage," damages may be awarded if the results of the defendant's conduct are "reasonably foreseeable." *Leaf River*, 662 So. 2d at 658.

[47] *Leaf River*, 662 So. 2d at 659. The majority observed that the standard was whether the defendant's conduct was "malicious, intentional, willful, wanton, grossly careless, indifferent, or reckless." *Id.* (citing *Sears*, 405 So. 2d at 901-02). In concluding that the defendant did not meet this standard, the majority noted evidence reflecting Leaf River's investigation into the dioxin problem, and subsequent attempts to resolve the problem. *Id.*

[48] *Leaf River*, 662 So. 2d at 658. The court cited *Sears*, 405 So. 2d at 900, where the Mississippi Supreme Court stated that damages may be assessed for mental and emotional stress, even though there has been no physical injury. *Leaf River*, 662 So. 2d at 658.

[49] *Leaf River*, 662 So. 2d at 658. The court determined that testimony from trial, including Dr. Arthur Hume's statement that it was probable that fish eaten by the Fergusons contained levels of dioxin, was insufficient. *Id.* at 652-53, 659. The court noted that the Fergusons did not have their blood or their land tested for dioxin. *Id.* at 659. Also, the court observed a lack of evidence establishing the presence of dioxin in the area immediately surrounding the Fergusons property. *Id.* at 660.

B. Dissenting Opinion

Justice McRae wrote a dissenting opinion in which he argued that the majority had reinstated the physical impact doctrine into Mississippi law.[52] He insisted that the evidence the majority felt was lacking would only reflect a physical impact of dioxin on the plaintiffs, which, after *Langley*, was no longer a predicate for recovery in an emotional distress action.[53] Justice McRae contended that emotional distress and fear of future illness are not distinguishable, and that the plaintiffs' emotional distress was not based on fear, but on evidence of river contamination.[54] The dissenting justice also argued that the defendant's conduct was grossly negligent, and that this level of behavior justified emotional distress recovery absent physical impact or subsequent physical injury.[55] In allowing recovery for emotional distress, Justice

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[50] *Id.* at 658. The court determined that the plaintiffs' claims were too remote to justify their alleged fears. *Id.* at 660.

[51] *Id.* at 650, 659-60. The court commented that the Fergusons could bring an action upon manifestation of illness. *Id.* at 650.

[52] *Id.* at 665 (McRae, J., dissenting). Justice McRae asserted that the majority required the plaintiffs to demonstrate a physical impact to recover, which was contrary to current Mississippi law. *Id.* (McRae, J., dissenting).

[53] *Id.* (McRae, J., dissenting). Justice McRae stated that proof that the plaintiff be physically touched by the defendant is not needed. *Id.* (McRae, J., dissenting).

[54] *Leaf River*, 662 So. 2d at 665-66 (McRae, J., dissenting). The dissenting justice contended that the majority erroneously separated emotional distress from fear, when in fact the emotional distress was the plaintiffs' fear of future illness. *Id.* (McRae, J., dissenting). Justice McRae maintained that the emotional distress was based, not on fear, but on evidence of fish kills, water discoloration, and other indications of river contamination. *Id.* at 666 (McRae, J., dissenting).

[55] *Id.* at 665-67 (McRae, J., dissenting). Justice McRae stated that the defen-

McRae concluded that the only requirement needed is that the trauma be reasonably foreseeable.[56]

III. DISCUSSION

A. The Exposure Requirement

In *Leaf River Forest Products, Inc. v. Ferguson*, the Mississippi Supreme Court joined the majority of jurisdictions in requiring exposure in fear of future illness claims.[57] However, the *Leaf River* opinion initially stated that the requirement was based on proof of "substantial exposure," but later the court referred to it as "substantial proof of exposure."[58] This seemingly unintentional discrepancy could lead to inconsistent litigation, since a "substantial exposure" condition implies that a claimant must demonstrate evidence of severe exposure, such as some resulting physical manifestation.[59] Conversely, a requirement of "substantial proof of exposure" could be satisfied merely by positive medical testing.[60] Furthermore, as a result of the exposure requirement, claims alleging fear of

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dant was grossly negligent, based on evidence inferring that the mill knowingly contaminated the Leaf River even after the dioxin problem had been revealed. *Id.* at 667 (McRae, J., dissenting).

[56] *Id.* at 665 (McRae, J., dissenting). Justice McRae argued that the plaintiffs' fears were reasonably based on scientific evidence. *Id.* at 666 (McRae, J., dissenting). The dissenting justice concluded that since the majority reinstated the impact doctrine, the case should be remanded to permit the plaintiffs to prove physical impact. *Id.* at 668 (McRae, J., dissenting).

[57] *See supra* notes 27, 33, 43 and accompanying text. The exposure requirement serves as an objective test which enables courts to determine the validity and reasonableness of an alleged fear. *See supra* notes 27, 33, 43 and accompanying text.

[58] Leaf River Forest Prods., Inc. v. Ferguson, 662 So. 2d 648, 650, 658. By stating that the Fergusons could have legitimized their claim by demonstrating exposure to their person or property, the *Leaf River* court indicated that the requirement was one of "substantial exposure." *Leaf River*, 662 So. 2d at 659.

[59] *See supra* note 31 and accompanying text. In fear of cancer actions based on asbestos exposure, courts have determined that mere exposure to asbestos was insufficient unless accompanied by evidence of some asbestos-related condition. *See supra* note 31 and accompanying text.

[60] *See supra* note 42 and accompanying text. Courts have relied on testing to validate or relieve a claimant's alleged fear. *See supra* note 39, 42 and accompanying text.

AIDS based on exposure to an HIV carrier will probably fail since exposure to a carrier could not be substantiated by testing unless the virus had actually been transmitted.[61]

B. *The Rational Basis Requirement*

While requiring that there be medical evidence to prove that the fear is rational, the *Leaf River* court indicated that such evidence must demonstrate "possible or probable future illness."[62] As a result, courts could require evidence of possible future illness, which would be satisfied by simply demonstrating an increased risk of developing the disease.[63] However, if courts require a demonstration of probable future illness, this threshold could only be satisfied by evidence showing a greater than fifty percent chance of contracting the feared disease.[64] Thus, in fear of illness actions, claimants with genuine and reasonable fears may be denied recovery simply because they cannot establish a medical probability of developing the feared disease.[65]

C. *Policy Considerations*

The *Leaf River* decision reflects several current policy considerations in emotional distress law. By predicating recovery upon proof of exposure and demonstration of a rational basis for the fear, *Leaf River* insures compensation for those claimants with legitimate fears.[66] Also, the *Leaf River* decision limits the plaintiff class in fear of future illness actions, thereby preventing a floodgate of litigation.[67] The exposure requirement from *Leaf River* did not resurrect Mississippi's dormant physical impact doctrine, since exposure is almost unanimously recognized as a requirement in fear of future illness actions, even in jurisdictions that have repudiated the impact doctrine.[68]

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[61] *See supra* note 41 and accompanying text. Courts have refused to allow recovery for fear after HIV-negative tests, notwithstanding evidence of exposure to an HIV carrier. *See supra* notes 37, 41.

[62] *Leaf River*, 662 So. 2d at 658. The *Leaf River* court stated that the Fergusons presented no evidence to demonstrate a possible or probable future illness. *Id.*

[63] *See supra* notes 30, 36 and accompanying text. Generally, courts have allowed recovery for fear of future illness without evidence that the disease is likely to occur, reasoning that the fear is a present injury which justifies compensation. *See supra* note 30, 36 and accompanying text.

[64] *See supra* notes 29-30 and accompanying text. Some courts have required that a claimant present medical evidence demonstrating that the feared condition is more likely than not to occur. *See supra* notes 29-30 and accompanying text.

[65] *See supra* notes 30, 38 and accompanying text. A claimant's fear can be reasonable even though there is little medical evidence indicating the probability that the feared disease will manifest. *See supra* note 30 and accompanying text.

IV. CONCLUSION

The *Leaf River* decision indicates Mississippi's unwillingness to allow recovery for speculative claims in emotional distress actions based on fear of future illness. While courts may encounter some difficulty in interpreting the requirements presented in *Leaf River*, the decision reflects sound policy and provides an adequate framework for future litigation. The *Leaf River* decision furnishes guidelines which will enable claimants to recover for fear of future illness within the parameters of current emotional distress law.

Bradley Peacock

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[66] *See supra* note 38 and accompanying text. By allowing recovery for all fear claims that are reasonable, defendants may be unable to provide compensation for those plaintiffs actually injured. *See supra* note 38 and accompanying text.

[67] *See supra* note 38 and accompanying text. Without limitations, the plaintiff class in fear of future illness cases would be great, since everyone is exposed to potential health hazards each day. *See supra* note 38 and accompanying text.

[68] *See supra* notes 27, 33, 43 and accompanying text. It seems to be a matter of semantics, since some courts have required that the plaintiff only demonstrate reasonableness, but have then stated that reasonableness can only be satisfied when the fear is accompanied by a physical injury. *See supra* note 32 and accompanying text.

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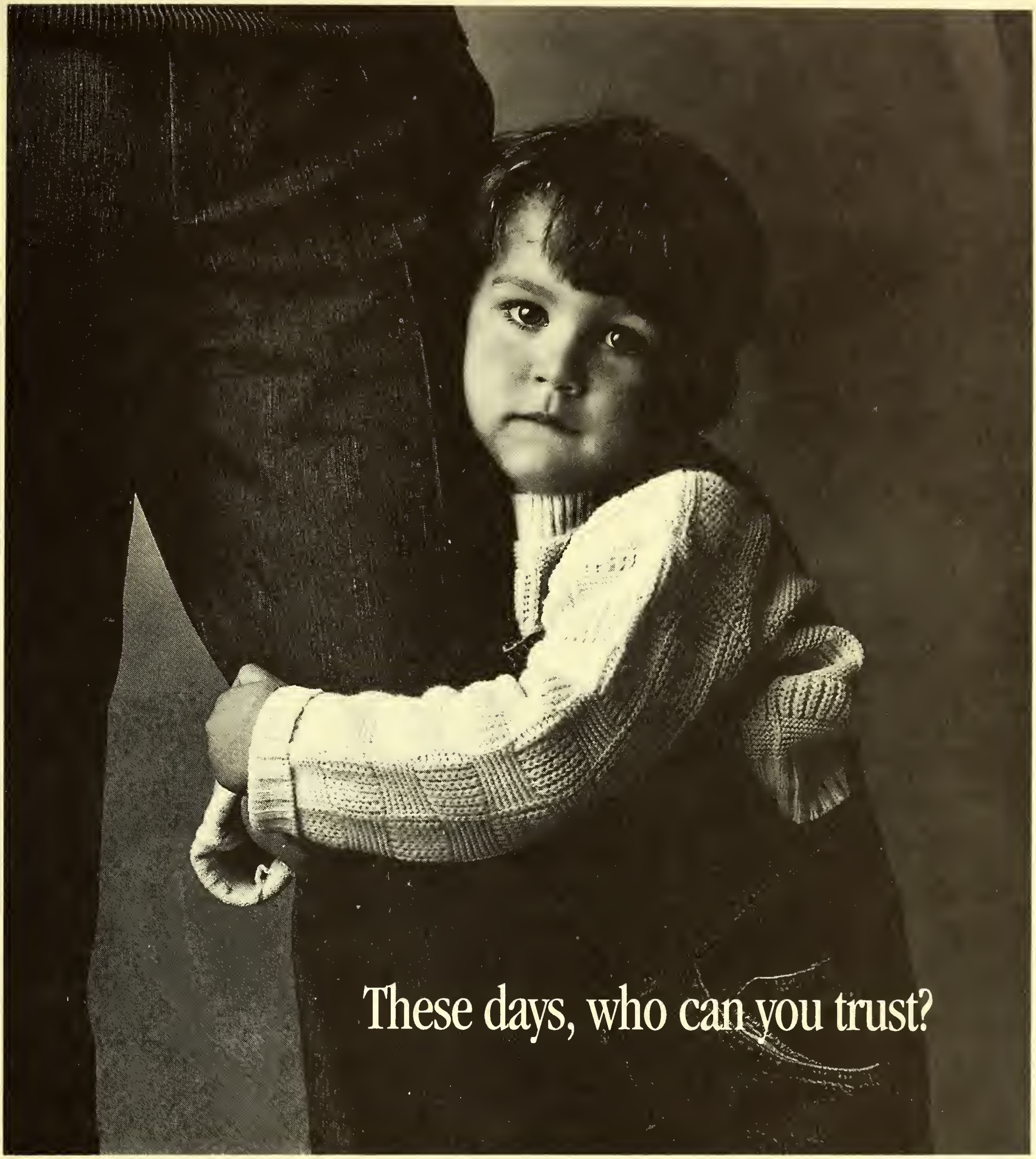
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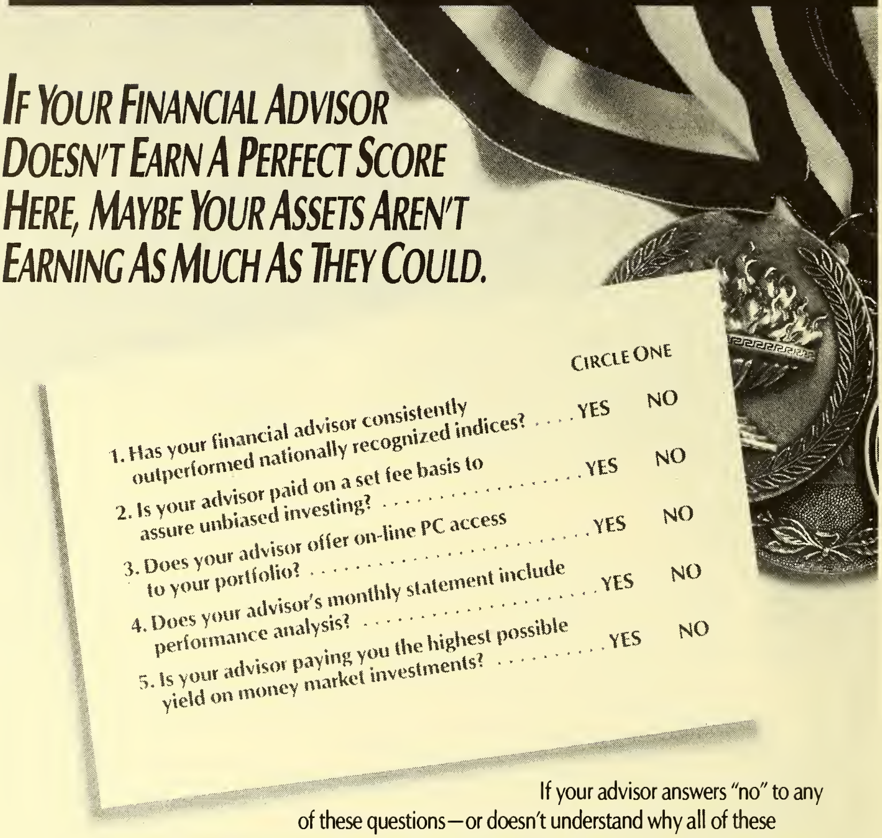IF YOUR FINANCIAL ADVISOR DOESN'T EARN A PERFECT SCORE HERE, MAYBE YOUR ASSETS AREN'T EARNING AS MUCH AS THEY COULD.

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